No. 78-1918

In the Supreme Court of the United States

OCTOBER TERM, 1978

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY,
PETITIONERS

v.

PPG INDUSTRIES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PPG INDUSTRIES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Administrator and Regional Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 587 F.2d 237. The final deci-

sion of the Administrator (App. F, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on January 8, 1979. A timely petition for rehearing was denied on February 26, 1979. On May 23, 1979, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including June 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals has original jurisdiction under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. 7607(b)(1), to review a final action by the Administrator applying new-source performance standards to certain power generating facilities.

STATUTES INVOLVED

Section 307(b)(1) of the Clean Air Act, as amended by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 776 (to be codified at 42 U.S.C. 7607(b)(1)), provides in pertinent part:

> A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), any order under section 111(j), under section 112(c), under section 113(d), under section 119, or under section 120, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under

> regulations thereunder, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.

STATEMENT

1. Section 111 of the Clean Air Act directs the Administrator of EPA to set standards of emissions performance for all "new sources" of air pollution. 42 U.S.C. 7411. A "new source" is defined as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." 42 U.S.C. 7411(a)(2). The Administrator is directed to publish, from time to time, a list of stationary sources which he determines may contribute significantly to air pollution endangering the public health or welfare, and thereafter to publish standards of performance for new sources in each category. 42 U.S.C. 7411(b)(1)(A).

On March 31, 1971, the Administrator published an initial list of stationary sources that included "fossil fuel-fired steam generators." 36 Fed. Reg. 5931 (1971). Later that year, regulations for this category were published and became effective on August 17, 1971. See 40 C.F.R. 60.1-60.15 and 60.40-60.46. The regulations set effluent limitations, depending on the heat generating capac-

ity of the new source. 40 C.F.R. 60.42-60.45. The regulations provide that any owner or operator may apply to the Administrator for a determination of whether action taken or intended to be taken by the owner or operator constitutes "construction" subject to the act and the regulations. 40 C.F.R. 60.5. Section 307(b)(1), 42 U.S.C. 7607(b)(1), provides that a petition for review of "any" "final action" of the Administrator may be filed only in the court of appeals. See generally *Train* v. *NRDC*, 421 U.S. 60 (1975).

2. PPG Industries, Inc., a chemical manufacturing corporation, constructed a new power facility in Louisiana utilizing a coordinated system of two gas turbine generators combined with two "waste heat" boilers.[1] The turbines and boilers are fossil-fuel fired (App. E, *infra*). EPA informed the company in October 1976 that the new-source performance standards for stationary sources (NSPS), 40 C.F.R. 60.40, applied to the waste-heat boilers (App. C, *infra*). In April 1977 PPG submitted a request for a determination under 40 C.F.R. 60.5 that construction of the waste heat boilers commenced prior to the effective date of the regulation (so that the boilers were not "new sources"), or, in the alternative, a determination that the NSPS regulations are inapplicable altogether to "waste-heat" boilers (App. E, *infra*). EPA determined, however, by letter of June 8, 1977,

[1] The gas turbines produce electricity. The "waste heat" boilers utilize the exhaust heat from the gas turbines and the combustion of additional fossil fuels to produce steam for use in PPG's chemical processing.

that the two boilers were new sources subject to the regulations (App. F, *infra*). On August 18, 1977, EPA clarified its decision and required PPG to install continuous in-stack opacity monitors (App. G, *infra*).

3. On October 4, 1978, PPG filed a petition for judicial review of this determination in the court of appeals. Shortly thereafter, PPG also filed a complaint against petitioners in the United States District Court for the Western District of Louisiana for an injunction and a declaratory judgment invalidating the agency's ruling. *PPG Industries* v. *Costle*, Civ. Action No. 77-1271 (W.D. La.). PPG then challenged the jurisdiction of the court of appeals to review EPA's determination. EPA contended that every "final action" of the Agency, including the determination in this case, is reviewable exclusively by the court of appeals under Section 307(b)(1). The Fifth Circuit disagreed, holding that "any other final action" in Section 307(b)(1) did not include EPA's determination. The court did not reach the merits.

The court based its jurisdictional holding on three arguments. First, the court noted that prior to the 1977 amendment to Section 307(b), "the district courts and not the courts of appeals had jurisdiction [under 28 U.S.C. 1331] to review determinations of [such] local applications * * *" (App. A, *infra*, 11a).[2] Although the 1977 amendment added the

[2] Prior to amendment, Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1), provided:

> A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111

phrase "any other final action" to the statutory list of items to be reviewed by the courts of appeals, the court thought that it was "most revealing" that the legislative history of this amendment made no reference to any "massive shift of jurisdiction to the courts of appeals" (*id.* at 15a). This silence suggested to the court that Congress did not really mean to shift review of numerous "local determinations" by EPA to the court of appeals. Second, pointing out that the administrative record here consists exclusively of correspondence, the court stated that an administrative determination based on "a skeletal record" should be reviewed by the district court in the first instance so that "[t]he discovery apparatus of district courts" could permit "fact and record development." Congress, the Fifth Circuit noted (*id.* at 20a-21a), must have inserted "any other final action" into Section 307(b)(1) with the "mechanical

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any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. *A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit.* Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day. [Emphasis added.]

limitations of the courts of appeals in mind." Finally, the court noted that Section 307(b)(1) specifically enumerates certain determinations for review in the court of appeals before adding the phrase "and any other final action." This enumeration, the court thought, would be redundant if "any other final action" literally comprehended *any* final action (App. A, *infra*, 15a). Therefore, the Fifth Circuit held that Section 307(b)(1)'s "any other final action" did not include a determination under 40 C.F.R. 60.5 that a specific facility is a new source.

REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals is incorrect. Prior to the 1977 amendment, Section 307(b)(1) provided that certain specifically enumerated actions of nationwide consequence were reviewable in the District of Columbia Circuit and that analogous local actions were reviewable in the appropriate regional circuits. The amendment added to the list of actions reviewable exclusively in the District of Columbia Circuit the promulgation of any rule issued under Sections 113, 119 or 120, and "any other nationally applicable regulations *or final action* taken" under the Act. In parallel fashion, the amendment added to the list of EPA actions reviewable in the appropriate regional court of appeals the promulgation of any order under Sections 111(j), 112(c), 113(d), and 120, and "any other final action of the Administrator" under the Clean Air Act "which is locally or regionally applicable." Congress, therefore,

clearly meant to confine review of all "final actions" in the courts of appeals.

a. EPA's determination that PPG's boilers are subject to its new-source regulations is a "final action" within the meaning of Section 307(b).[3] First, short of an enforcement action, the agency has rendered its final word on the matter. PPG applied for a formal determination under 40 C.F.R. 60.5 concerning whether its facility is subject to the new-source regulations. After consideration of PPG's submissions, including a law memorandum, EPA determined that the facility is subject to the regulations. PPG's disagreement with that determination turns only on an interpretation of the new-source regulations and their application to undisputed facts. No further administrative appeals remain and, unless PPG honors EPA's ruling, it will be enforced through enforcement proceedings under Section 113, 42 U.S.C. 7413. Second, one of the purposes of pre-enforcement review is to permit prompt review of an agency's final decision before the applicant acts at its peril. That purpose would be served here. See generally *Abbott Laboratories* v. *Gardner*, 387 U.S.

[3] Section 307(b)(1) requires that petitions for review be filed within 60 days "from the date notice of such promulgation, approval or action appears in the Federal Register * * *." EPA has informed us that it has not routinely published in the Federal Register notice of actions such as the determination made in this case, but that it intends to begin doing so in the near future. (EPA did not publish the PPG determination). The only effect of this lapse would seem to be a tolling of the running of the 60-day limitation on review.

136, 148-156 (1967); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 170-174 (1967); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164-165 (1967).

Third, the EPA's determination in this case is akin to other types of actions specifically considered "final" under Section 307(b). For example, Section 307(b) makes "orders" under Section 112(c) reviewable only in the courts of appeals. Section 112(c) prohibits the construction of any new source which will, "in the Administrator's judgment" emit "hazardous air pollutants" for which the Administrator has set a standard unless, among other things, "the Administrator finds that such source if properly operated will not cause emissions in violation of such standard * * *."[4] An inquiry to the Administrator for his "judgment" whether a facility would emit hazardous air pollutants and, if so, for his determination that its proper

[4] Similarly, Section 307(b) permits review in the court of appeals of "any order under section 111(j)." Section 111(e) prohibits the operation of new sources in violation of the new-source standards. Section 111(j) allows "[a]ny person proposing to own or operate a new source" to "request the Administrator for one or more waivers" in order to "encourage the use of an innovative technological system or systems of continuous emission reduction." The Administrator may grant the request after a public hearing. He may deny it without a hearing. Such "orders" are reviewable under Section 307(b). Once again, a denial of such a request is akin to a denial of PPG's request for a determination that its facility is not subject to the new source regulations at all. The activity in question has not yet occurred but is known. It is important to the requesting party to have a final agency determination and judicial review of the determination before proceeding at its peril.

operation would meet the specified effluent levels, is very similar to PPG's request under 40 C.F.R. 60.5 for a determination that its proposed boilers would not be covered by the new-source regulations. In both cases, the new source is not yet operational but the pertinent facts are known. In both cases, no formal hearing is held. In both cases, the applicant has a legitimate need for a final resolution before it proceeds at its peril.

b. The Fifth Circuit's contrary view is not persuasive. The court was moved by the absence of any mention in the legislative history of a "massive shift" of jurisdiction to the court of appeals. But we cannot disregard the plain language of a statute merely because it is not repeated in the legislative history. Committee reports need not state what is already obvious. See *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). In fact, however, although the legislative evidence is meager, the House Report did state that the amendment "provides for essentially locally, statewide or regionally applicable rules or orders to be reviewed in the United States Court of Appeals for the circuit in which such locality, state or region is located." H.R. Rep. No. 294, 95th Cong., 1st Sess. 323 (1977). By contrast, there is no mention of judicial review in the district courts. Moreover, although the number of actions comprehended by "any other final action" is substantial (see note 8, *infra*), it would not seem so "massive" that it ineluctably would have provoked comment in the legislative history.

The court's second point is that Congress could not have intended to require review of such determinations in appellate courts which lack the procedural means to supplement thin records. The size of an administrative record, however, is not determinative of jurisdiction. The Court has firmly established that a reviewing court can look only to the record created by the agency. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973). A court's capacity to conduct discovery, therefore, is irrelevant to its authority to review administrative action. Where the record is lacking, the remedy is remand to the agency for further consideration.[5] *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971). The Fifth Circuit's opinion invites the district court to go far beyond the administrative record and to create a judicial record much broader than the administrative proceedings.[6] Whether the district or appellate court

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[5] *Save the Bay, Inc.* v. *Administrator*, 556 F. 2d 1282 (5th Cir. 1977), cited by the court, is distinguishable. *Save the Bay, Inc.* involved a challenge to EPA's *inaction* in failing to veto a state-issued permit. Jurisdiction in *Save the Bay* was dependent upon an EPA issuance or denial of a permit. Because EPA had neither issued nor denied the permit, the court found it lacked jurisdiction. The reason the record in that case was sparse was because EPA had not done anything. By contrast, EPA has acted to apply certain regulations to PPG's facility, and the record of that action is set forth in the exchange of correspondence.

[6] The subsequent proceedings in *Overton Park* demonstrate this danger. Although the district court was allowed on remand to make a limited inquiry into factors influencing the

has original jurisdiction, however, the remedy for an incomplete administrative record is the same—remand to the Agency.

Equally flawed is the court's rationale that the specifically enumerated actions in Section 307(b) would be superfluous if "any other final action" really comprehended all final actions. Congress was amending a previous provision that allowed review of specifically enumerated items. Simply substituting "any final action" might well have left a doubt whether Congress intended to discontinue review in the court of appeals of the old list of specifically enumerated items. This drafting problem was conveniently solved by leaving the old list intact and adding the phrase "any *other* final action." The word "other" eliminates any overlap with the specifically enumerated items. In any event, it is hardly a novel legislative technique to indulge in some redundancy out of abundance of caution.[7] Even when intending to reach all like actions, it is not unusual to find certain actions specifically named.

2. The decision imposes a severe burden on the administration of the Clean Air Act. Except for the

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administrator's decision, the district court conducted a 25-day, evidentiary trial with substantial probing into the administrative procedure. *Citizens to Preserve Overton Park* v. *Volpe*, 335 F. Supp. 873, 878 (D.C. Tenn. 1972).

[7] The practice dates at least from the re-issue of Magna Carta in 1225 in the reign of Henry III. Chapter 23 of that charter (reprinted in 6 *Halbury's Statutes of England* 404 (3d. ed. 1969)), provides:

> All Wears from henceforth shall be utterly put down by Thames and Medway, and through all England, [except] only by the sea-coasts.

specifically enumerated items, the decision leaves jurisdiction to review EPA action entirely to chance. The size and quality of the administrative record determines the appropriate forum. This was very recently illustrated in another Fifth Circuit decision, *United States Steel Corporation* v. *EPA*, No. 78-1922 (May 3, 1979). In that case, the Fifth Circuit accepted jurisdiction under Section 307(b)(1) over EPA's promulgation of regulations because that action was "based on a substantial record." The *United States Steel* court reaffirmed *PPG*'s holding that under Section 307(b)(1) "some actions will be reviewable only in the district courts" because those actions were "made without the development of a full record" (slip op. 6).

This criterion creates serious problems. Many cases will fall within the newly created "twilight zone." [8] In the future, parties may seek to reduce (or enlarge) the size of the administrative record in

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[8] There are approximately 90 actions now pending against EPA (of which four are in the Fifth Circuit) which depend on the meaning of "any other final action" to determine proper jurisdiction. The majority of the cases are actions seeking review of either non-attainment area designations by EPA under Section 107 or of EPA regulations or permits relating to the prevention of significant deterioration under Section 165. Other cases include a challenge to an EPA order under Section 207(c) to recall automobiles not complying with the carbon-monoxide standard and a challenge to EPA guidance to states for control techniques for sources of volatile organic compounds. In at least two instances, other than the present case, simultaneous proceedings to review EPA actions have been filed in the district courts and the courts of appeals.

order to obtain review the district court (or the court of appeals). Uncertain as to the correct court, petitioners will file precautionary actions in both the district court and the court of appeals. In many instances, burdensome discovery will be conducted in the district courts. Jurisdiction will be a hotly contested issue in every case no matter where it is filed. At all events, the decision below destroys the clear-cut scheme of review established by Congress under which all pre-enforcement review is in the court of appeals and all enforcement actions are in the district courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

No. 77-2989

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

PPG INDUSTRIES, INC., PETITIONER

v.

ADLENE HARRISON, REGIONAL ADMINISTRATOR, and DOUGLAS M. COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

Jan. 8, 1979

Petition for Review of an Order of the Environmental Protection Agency.

Before RONEY, TJOFLAT and HILL, Circuit Judges.

RONEY, Circuit Judge:

In this case PPG Industries, Inc. appeals an action of the Administrator of the Environmental Protection Agency (EPA) subjecting the "waste heat" boilers of its recently constructed power plant to new source performance standards for fossil fuel-fired steam generating units. 40 C.F.R. §§ 60.40-46 (1977). PPG first challenges this Court's jurisdiction to entertain the appeal, having filed its petition for review both here and in the district court because of jurisdictional uncertainty. On the merits PPG

contends that the performance standards for fossil fuel-fired steam generators have no application to its waste heat boilers, which are fueled only partially by fossil fuels. Even if the standards apply, PPG argues, the final action taken by the Administrator here was without statutory authority for two reasons: first, having started construction before the effective date of the regulations, the waste heat boilers were not a "new source" to which the statute applied; second, the Administrator had authority only to set standards for emission limitations, whereas here a standard for source fuel was imposed. In any event, PPG asserts the Administrator's action was arbitrary and capricious. Finding this Court lacks jurisdiction, we dismiss the petition.

I. *PPG's Lake Charles Facility*

Petitioner PPG Industries, Inc. owns and operates a chemical manufacturing plant located at Lake Charles, Louisiana, which requires large amounts of steam and electricity for its operations. To meet its energy requirements, PPG recently constructed a power plant designed to take advantage of fuel-efficient "cogeneration" technology. The power plant is comprised of two similar units. In each unit fossil fuel is burned in a General Electric gas turbine generator to produce electricity. Energy, or "waste heat" thrown off by the turbine's exhaust, which would normally be discharged into the atmosphere, is funnelled as a heat source into a "waste heat" boiler which also burns fuel oil. This exhaust from the

turbines contributes nearly 40% (approximately 371 million British thermal units per hour) of the total input to the waste heat boiler, while the remaining heat (approximately 598 million British thermal units per hour) is provided by combustion of fuel oil or natural gas, known as fossil fuels. The highly pressurized steam produced by the waste heat boiler is first used to turn a "backpressure" turbogenerator, thereby creating more electricity, and is then channelled into PPG's main plant for use in the manufacturing process.

The air pollutants from PPG's power plant are similar to those of any other boiler fired by fuel oil. The pollutant of principal concern is sulfur dioxide, which is formed during combustion of sulfur-bearing fuels in the presence of oxygen. Virtually all of the sulfur dioxide emissions from the power plant are directly attributable to the combustion of fuel oil in the waste heat boiler and virtually none to the gas turbine exhausts.

PPG can control its sulfur dioxide emissions through use of either flue gas desulfurization equipment ("scrubbers") or fuel oil with a low sulfur content. In addition to sulfur dioxide emissions, PPG's power plan will emit particulate matter and nitrogen oxides. These pollutants are not of great concern in this case because nitrogen oxides are controlled primarily through boiler design, and combustion of fuel oil does not produce significant particulate emissions.

II. *The Statutory and Regulatory Framework*

In passing the Clean Air Act Amendments of 1970, Congress for the first time established a comprehensive federal-state scheme for the control and abatement of air pollution. Pub.L. No. 91-604, 84 Stat. 1676 (December 31, 1970), *codified at* 42 U.S.C. § 1857 (1970). The Clean Air Act was again substantially amended in 1977, Pub.L. No. 95-95, 91 Stat. 685 (August 7, 1977), and the final amended version is codified at 42 U.S.C. § 7401-7642.[1]

The 1970 Amendments required the EPA Administrator to set national ambient air quality standards for "criteria" pollutants.[2] Each state, in turn, was required to adopt and submit for EPA approval a plan providing for "implementation, maintenance, and enforcement" of the national standards within the given state. 42 U.S.C.A. § 7410.

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[1] The history and structure of the 1970 Amendments are discussed in *Train* v. *National Resources Defense Council, Inc.*, 421 U.S. 60, 63-67, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975).

[2] 42 U.S.C. §§ 1857c-3, 1857c-4 (1970), *as amended* 42 U.S.C.A. §§ 7408, 7409.

National ambient air quality standards are of two types. "Primary" standards are those which, in the Administrator's judgment, are "requisite to protect the public health." "Secondary" standards are "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [a criteria] air pollutant in the ambient air." 42 U.S.C.A. § 7409(b)(1) and (2).

Standards have been set for six "criteria" pollutants: sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. 40 C.F.R. §§ 50.4-.11 (1977).

While emissions from both existing and new sources of pollution are regulated under the various state implementation plans, Congress, "concerned that new plants—new sources of pollution—would have to be controlled to the greatest degree practicable if the national goal of a cleaner environment was to be achieved," *Essex Chem. Corp.* v. *Ruckelshaus*, 158 U.S.App.D.C. 360, 486 F.2d 427, 434 n.14 (D.C.Cir. 1973), *cert. denied*, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974), determined that all new sources should be subject to an additional layer of federal control. It therefore enacted § 111, which required the establishment of "standards of performance" for all new sources. 42 U.S.C. § 1857C-6 (1970), *as amended*, 42 U.S.C.A. § 7411. "New source" is defined under the Act as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." 42 U.S.C.A. § 7411(a)(2).

Under § 111(b), the Administrator was directed to publish, and from time to time revise, a list of those categories of stationary sources which he determined "may contribute significantly to air pollution which causes or contributes to endangerment of public health or welfare." Subsequently, he was to promulgate, after proposal and opportunity for public comment, standards of performance for new sources in the listed categories.

In accordance with this directive, the Administrator published an initial list of five stationary source categories on March 31, 1971. The listed sources were fossil fuel fired-steam generators, incinerators, portland cement plants, nitric acid plants, and sulfuric acid plants. Later that year, regulations establishing new source performance standards were proposed and promulgated for each of the listed categories of sources. Regulations of general applicability are grouped in Subpart A, 40 C.F.R. §§ 60.1-.15 (1977), while the regulations implementing the new source performance standards for fossil fuel-fired steam generators are located in Subpart D, 40 C.F.R. § 60.40-.46 (1977). The standards of performance are written as emission limitations (in pounds per million British thermal units heat input or grams per million calories) which may not be exceeded. *See* 40 C.F.R. §§ 60.42-.45 (1977).

The regulations define "fossil fuel-fired steam generating unit" and "fossil fuel" as follows:

> (a) "Fossil-fuel fired steam generating unit" means a furnace or boiler used in the process of burning fossil fuel for the purpose of producing steam by heat transfer.
>
> (b) "Fossil fuel" means natural gas, petroleum, coal, and any form of solid, liquid, or gaseous fuel derived from such materials for the purpose of creating useful heat.

Id. § 60.41. The Subpart D provisions are made applicable to "[e]ach fossil-fuel fired steam generating unit" of more than 250 million British thermal units per hour heat input. *Id.* § 60.40.

Each fossil fuel-fired steam generating unit must meet performance standards for particulate matter, sulfur dioxide, and nitrogen oxides. *Id.* §§ 60.42-.44. In order to measure compliance, § 60.45 provides that the source owner or operator must install, calibrate, maintain, and operate continuous monitoring systems for measuring the opacity of emissions, sulfur dioxide and nitrogen oxides emissions, and either oxygen or carbon dioxide in the flue gases.

III. *Agency and Court Proceedings*

As a result of correspondence in 1975 and 1976 with PPG and intervenor Continental Oil Company (Continental), EPA learned of the construction of the new power plant at PPG's Lake Charles facility. In response to an EPA inquiry, PPG informed the agency that it planned to start construction of the two waste heat boilers on January 1, 1976, and July 1, 1977. EPA promptly requested information regarding the construction of the power plant to determine whether it would be subject to new source performance standards promulgated under § 111 of the Clean Air Act.

In responses of May 14, 1976, and June 28, 1976, PPG provided detailed information on the design and construction of the new power plant, along with information regarding other power generating facilities at the Lake Charles works.

In a letter dated October 5, 1976, the Acting Director of the Enforcement Division of EPA's Region VI advised PPG that the performance standards for

fossil fuel-fired steam generating units would apply to the waste heat boilers of the power plant because in the Director's view the construction of the boilers was commenced after August 17, 1971, the date on which the Subpart D regulations were proposed. In particular, the Director noted that the final purchase order for the first of the two waste heat boilers was dated October 14, 1974.

PPG responded by a letter dated November 12, 1976, contending that each of the two sets of turbines and boilers in the power plant constituted a single integrated unit, that construction of each unit was commenced in 1970, and that the turbogenerator purchased in 1970 would be completely useless without the waste heat boilers. In a letter dated December 22, 1976, the Region VI Director answered that "[e]ven though [PPG] may have ordered equipment before the the date of the proposed regulations that would be completely useless without the steam generators, that action is irrelevant to determine the applicability of the regulations to the two steam generators."

On April 13, 1977, PPG filed a formal request under 40 C.F.R. § 60.5 (1977)[3] for an EPA determi-

[3] 40 C.F.R. § 60.5 (1977) provides in pertinent part as follows:

> (a) When requested to do so by an owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part.
>
> (b) The Administrator will respond to any request for a determination under paragraph (a) of this section within 30 days of receipt of such request.

nation that (1) the standards of performance do not apply to boilers which, like those at PPG's Lake Charles works, derive a substantial amount of heat from turbine exhaust gases (waste heat) and (2) that construction of PPG's new power plant was commenced prior to August 17, 1971, the date of publication of proposed standards of performance for fossil fuel-fired steam generators. PPG also asked EPA for a clarifying determination as to the application of the Subpart D standards of performance to waste heat boilers if EPA ultimately determined that the standards governed the operation of PPG's boilers.

The Regional Administrator of EPA's Region VI responded to PPG's three requests on June 8, 1977. EPA determined that PPG's waste heat boilers came within the scope of the standards of performance for fossil fuel-fired steam generators because each of the boilers is capable of operating at 250 million British thermal units per hour heat input. The fact that the boilers were designed to manufacture steam through combined use of turbine exhaust gases and the burning of fossil fuel was disregarded. EPA also rejected PPG's argument that construction of the waste boilers should be considered to have commenced before August 17, 1971, at the time that construction commenced on the power plant as a whole.

In response to PPG's request for a determination clarifying application of the performance standards to the waste heat boilers output, EPA ruled that compliance with the standards would be judged only

on the amount of heat and combustion effluents produced by the fossil fuel burned in the waste heat boilers. The turbine generators, having been ordered prior to August 17, 1971, were not subject to federal standards of performance. The combustion effluents and thermal energy from the turbines could therefore be discharged into the atmosphere without being limited by the standards. Reasoning that there would be no logic in penalizing an owner or operator who chooses to use the exhaust heat in a waste heat recovery steam generator unit rather than discharge it into the atmosphere, EPA ruled that both the heat input and the emission contribution of the combustion turbine would be excluded in determining whether the steam generator plant complies with the standards.

The Director of the Division of Stationary Source Enforcement of EPA ultimately upheld these determinations and further ruled that PPG would be required at all times to burn fuel containing a sulfur content equal to or less than a sulfur level to be specified as a result of performance tests conducted in compliance with the performance standards. He further determined that PPG was not required to install equipment for and to conduct the continuous monitoring for sulphur dioxide and nitrogen oxides mandated by the performance standards, but that under the standards PPG would be obliged to install and operate continuous opacity monitors in the stacks of the waste heat boilers and might also be required to monitor and report on the sulfur content of the fossil fuel burned in the boilers.

PPG filed this petition for review. Since PPG challenges this Court's jurisdiction to review EPA's actions in this case, it has also filed, as a precautionary measure, an action for review in the United States District Court for the Western District of Louisiana. *PPG Industries, Inc.* v. *Costle*, No. 77-1271. EPA has moved to stay the district court action pending a determination in this Court of its jurisdiction to hear this petition.

IV. *Jurisdiction*

PPG argues that the district court, rather than the court of appeals, should have jurisdiction of this review. Although disputing this Court's jurisdiction, PPG filed a timely petition for review here as a protective measure while concurrently filing suit in the Western District of Louisiana. No ruling concerning jurisdiction had been made by the district court when this case was argued.

Prior to the passage of the Clean Air Act Amendments of 1977, the district courts and not the courts of appeals had jurisdiction to review determinations of local applications such as the one before us. 28 U.S.C.A. § 1331(a) confers jurisdiction on the federal district courts to review agency action, subject only to preclusion by review statutes created or retained by Congress. *Califano* v. *Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). The court in *Utah Power & Light* noted that district court jurisdiction has been recognized under section 10 of the Administrative Procedure Act, 5 U.S.C.A. §§ 701-706. 553 F.2d at 219 n.20. The Supreme Court in

Califano v. *Sanders*, however, concluded that the amendment of § 1331 to eliminate the specified jurisdictional amount requirement for a review of agency actions undercuts the rationale for interpreting the Administrative Procedure Act as an independent jurisdictional provision. 430 U.S. at 105, 97 S.Ct. 980, 51 L.Ed.2d 192. The controlling issue, therefore, is whether the 1977 Amendments have changed the law to require that this review should take place initially in the courts of appeals. We conclude that they have not.

The Clean Air Act Amendments of 1977 added new language to § 307(b)(1), the judicial review provision of the Act. The new Act provides exclusive jurisdiction in the courts of appeals to review "any order" issued under several specifically enumerated sections and "any other final action of the Administrator under this Chapter . . . which is locally or regionally applicable." [4] The EPA determinations in-

[4] As amended, § 307(b)(1) provides in pertinent part:

> A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before August 7, 1977) or under regulations thereunder, *or any other final action of the Administrator under this chapter* (including any denial or disapproval by the Administrator under subchapter I of this chapter) *which is locally or regionally applicable* may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.

42 U.S.C.A. § 7607(b)(1) (emphasis added).

volved in this case do not fall within any enumerated sections of the statute. They are, rather, the Administrator's interpretations and applications of regulations promulgated pursuant to § 111 of the Act. Therefore they must come under the "any other final action" clause of the statute if the court of appeals is to have jurisdiction. The parties agree the action is locally applicable, so that if there is court of appeals jurisdiction, it is here rather than in the D.C. Circuit.

The addition of the "any other final action" language to the statute distinguishes the District of Columbia Circuit case of *Utah Power & Light Co.* v. *EPA*, 180 U.S.App.D.C. 70, 553 F.d 215 (1977), upon which PPG relies. There the court held that the language of § 307(b)(1) of the 1970 Amendments to the Clean Air Act [5] and "the policy consid-

[5] Section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1), specifies a number of grounds for direct review in the court of appeals:

> A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be

erations underlying that provision compel the conclusion that challenges to the *validity* of certain agency regulations are directly reviewable by courts of appeals, whereas challenges to *interpretations* of those regulations are not." (emphasis added) 180 U.S. App.D.C. at 73, 553 F.2d at 218. The court determined that Utah Power & Light Company was attacking the particular interpretation and application of the regulations to three power plants and not the validity of the regulations themselves.

PPG argues that the phrase "any other final action . . . under this chapter" refers only to the provisions of the Act enumerated in § 307(b)(1). The EPA contends that the phrase should be interpreted literally to subject every agency final action to review by the courts of appeals. Neither argument is convincingly supported in the language of § 307(b)(1) itself. Had Congress intended to confer jurisdiction over only the enumerated sections, the "other final action" clause would be qualified by "under these

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prescribed under section 1857f-1(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title, or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit.

sections" rather than "under this chapter" which clearly refers to the Act as a whole. If Congress intended, however, to cast the entire responsibility for reviewing all EPA action under the Act into the courts of appeals, the numeration of specific sections would appear to be redundant.

The most revealing aspect of the legislative history of the revised § 307(b)(1) is its complete failure to mention what EPA asserts was a massive shift of jurisdiction to the courts of appeals.[6] In a legislative

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[6] Subsection (c) of section 305 of the bill is intended to clarify some questions relating to venue for review of rules or orders under the act. Paragraph (1) of that subsection makes it clear that any nationally applicable regulations promulgated by the Administrator under the Clean Air Act could be reviewed only in the U.S. Court of Appeals for the District of Columbia. These would include, to mention but a few examples, regulations to carry out the nonattainment policy referred to in section 117 of this bill and regulations to effectuate motor vehicle assembly-line test provisions of section 206 of the act or inspection/maintenance requirements under section 208 of this bill.

Subsection (c)(2) of section 305 provides for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court of appeals for the circuit in which such locality, State or region is located. This provision applies, except as otherwise provided in paragraph (4), to the Administrator's action in approving or promulgating an implementation plan for any State.

On the other hand, if an action of the Administrator is found by him to be based on a determination of nationwide scope or effect (including a determination which has scope or effect beyond a single, judicial circuit), then

report which discusses proposed changes for over 300 pages, such a sweeping revision would be unlikely to escape comment.

The likelihood that such a jurisdictional transfer was contemplated is further reduced by the nature of the "final actions" which this asserted shift would direct to the appellate courts and the state of the accompanying administrative records on which these actions would be reviewed. Many EPA decisions are the end product of agency procedures which produce an administrative record sufficiently complete for

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exclusive venue for review is in the U.S. Court of Appeals for the District of Columbia, under paragraph (4).

In adopting this subsection, the committee was in large measure approving the portion of the Administrative Conference of the United States recommendation section 305.76-4(A), that deals with venue.[10] The committee's view also concurs, however, with the comments, concerns, and recommendation contained in item No. 1 of the separate statement of G. William Frick, which accompanied the Administrative Conference's views.[11]

Also, as indicated earlier, the committee bill incorporates recommendation D2 of the Administrative Conference on extending the period for petitioning for judicial review in the court of appeals.

However, in no event should these provisions be construed as endorsement of the remainder of the Administrative Conference's recommendations. Some of these recommendations, such as those contained in items B and C, were simply not considered by the committee. Others (such as the recommendations in D1 and D3, were rejected.[12]

H.R. Rep. No. 294, 95th Cong., 1st Sess. ——, 323-24 *reprinted in* [1977] U.S. Code Cong. & Admin. News pp. 1077, 1402-03. The recommendations of the Administrative Conference are reprinted in C.F.R. § 305.76-4.

judicial review of the decision.[7] Others, like those challenged by PPG here, are determinations made during the course of the agency's operations as to how its regulations will be interpreted and applied. If such decisions could be made only after agency compilation of a thorough record, the agency's administration of the Act would be brought to a standstill. *Cf. Save the Bay, Inc.*, v. *Administrator of E. P. A.*, 556 F.2d 1282, 1292 (5th Cir. 1977). The skeletal record of the Administrator's grounds for such a decision, however, here a collection of correspondence between the agency and affected parties, may leave the reviewing court unable to verify the Administrator's grounds or, perhaps, to identify those grounds at all. *See, e.g., Save the Bay, Inc.*, 556 F.2d at

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[7] For example, the actions and standards made reviewable under the former § 307(b)(1) would have produced such records. Senator Cooper, endorsing unified review in the Courts of Appeals rather than jurisdiction shared with the district courts, explained:

> I prefer the judicial review framework in the bill for I believe that through the administrative process the Secretary can develop on the record all of the technical and other relevant information necessary to achieve a sound judgment. Similarly, and in accordance with general administrative law, such decision of the Secretary, should be reviewable in the court of appeals so that the interests of all parties can be fully protected. With the record developed by the Secretary, the court, as an unbiased, independent institution, is the appropriate forum for reviewing such decision and making a judgment as to its quality.

Senate Comm. on Public Works, 93rd Cong., 2d Sess., A Legislative History of the Clean Air Amendments of 1970 (Comm. Print 1974) at 386.

1292. (Record failed to reveal what factors caused EPA to refrain from exercising its veto power against a permit to discharge pollutants under the Federal Water Pollution Control Act).

The Administrator's decisions in this case would have to be reviewed under the standard supplied by the Administrative Procedure Act, 5 U.S.C.A. § 706. The Court must inquire (1) whether the action was within the scope of the agency's authority, (2) whether the agency conformed to procedural requirements, and (3) whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Texas* v. *EPA*, 499 F.2d 289, 296 (5th Cir. 1974), *cert. denied*, 427 U.S. 905, 96 S.Ct. 3191, 49 L.Ed.2d 1199 (1976). The third inquiry requires that the Court consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The Supreme Court in *Overton Park* remanded the case to the district court for review of the Secretary of Transportation's approval of highway construction through the city park and observed

> [S]ince the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if . . . the Secretary's action was justifiable under the applicable standard.

> The court may require the administrative officials who participated in the decision to give testimony explaining their action. . . . [H]ere there are no . . . formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

401 U.S. at 420, 91 S.Ct. at 825.

This Court has noted

> When Congress has vested this court with original review, it generally has done so in relation to an administrative process that more easily lends itself to production of a reviewable record.

Save the Bay, Inc., 556 F.2d at 1292. It is apparent that appellate courts, lacking the fact-finding mechanisms available to district courts, are ill-suited to conduct meaningful review of administrative actions resting on records as sparse as the one here.

Judge Clark has previously articulated the adverse effects flowing from the legislative mandate that judicial review proceedings of highly technical, factually complex administrative actions be initially injected into the court system at the appellate level. *See Texas* v. *EPA*, 499 F.2d 289, 321 (5th Cir. 1974) (Clark, J., concurring), *cert. denied*, 427 U.S. 905, 96 S.Ct. 3191, 49 L.Ed.2d 1199 (1976).

> No formal hearing has ever been held in this highly technical, factually complex matter. The administrative "record" upon which we had to base our review was comprised of only the sparest of documentation, for it essentially evolved

from an act of agency rule-making. To accentuate the problem the agency contracted the services of a private firm for the formulation of most of the rule requirements it ultimately adopted here, so that not even intra-agency background for these actions was available. The writing judge was required to hold both pre and post-argument conferences with counsel for the parties to enable the three of us as a court to comprehend the substance of the issues and conduct a minimally meaningful review.

The subject matter of this action involves the health and welfare of millions of citizens, the continued business vitality of tens of thousands of firms and compliance expenditures costing billions of dollars.

These extensive rights deserve a more orderly process of judicial reflection.

499 F.2d at 321-322.

The discovery apparatus of district courts permits the fact and record development prior to court confrontation. At this level, only after hearing, which may be long delayed because of other calendar commitments, can it be known whether the record is sufficient for review purposes. An insufficient record may necessitate a remand for fact-finding and record completion and a second court appearance, often before other judges, long delayed.

Whatever addition to the jurisdiction of the courts of appeals Congress may have contemplated by adding the "any other final action" language to § 307 (b) (1), we assume that section was drafted with

the mechanical limitations of the courts of appeals in mind. In light of the difficulty of review in this Court of the agency action challenged by PPG, we will not hold that review was intended to be here in absence of explicit congressional direction. The petition for review is therefore dismissed.

PETITION DISMISSED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Brenda Hauck
BRENDA HAUCK

Deputy, Mar. 6, 1979

New Orleans, Louisiana

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

No. 77-2989

PPG INDUSTRIES, INC., PETITIONER,

versus

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS M. COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS.

Petition for Review of an Order of the Environmental Protection Agency

Before RONEY, TJOFLAT AND HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of PPG Industries, Inc., for review of an order of the Environmental Protection Agency, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Environmental Protection Agency in this cause be, and the same is hereby, denied;

It is further ordered that the petitioner pay to the respondent the costs on appeal, to be taxed by the Clerk of this Court.

January 8, 1979

By /s/ Brenda Hauck
Deputy

Issued As Mandate: Mar 6 1979

APPENDIX C

OCT. 5, 1976

CERTIFIED MAIL—RETURN RECEIPT
REQUESTED #819271

Mr. T. G. Taylor
Technical Manager
PPG Industries, Inc.
P. O. Box 1000
Lake Charles, Louisiana 70601

Dear Mr. Taylor:

Your letter and attachments of June 28, 1976 have been received and reviewed. Based on the information in that letter and your earlier submittal of May 14, 1976, we have determined that the Standards of Performance for New Stationary Sources [40 C.F.R. Part 60] apply only to the two waste heat steam generators of Powerhouse C located at the Lake Charles, Louisiana plant.

The applicability of the New Source Performance Standards (NSPS) is determined solely by the facts applicable to the specific facilities for which NSPS regulations have been issued. It is not considered relevant for NSPS purposes that the gas turbines for Powerhouse C were ordered in 1970. The purchase order you submitted on the waste heat steam generator showed that the unit was ordered on October 14, 1974. Because the contractual obligation to construct the steam generators was after the date of the proposed regulations for fossil fuel fired steam genera-

tors, August 17, 1971, the waste heat steam generators numbered 1 and 2 of Powerhouse C are subject to the provisions of the Standards of Performance for Fossil Fuel Fired Steam Generators, 40 C.F.R. Part 60, Subpart D (a copy of which is enclosed).

The two waste heat steam generators are subject to the notification and recordkeeping requirements of 40 C.F.R. 60.7 and the performance tests requirements of 40 C.F.R. 60.8 (copies of which are enclosed).

If you have any questions concerning this matter, you may contact Mr. Gary Bernath of my staff by letter or by telephone at (214) 749-7675.
Sincerely yours,

ORIGINAL SIGNED BY

O. W. Lively
Acting Director
Enforcement Division (6AE)

Enclosure a/s

cc: Mr. James Coerver
Technical Secretary
Louisiana Air Control Commission
P. O. Box 60603
New Orleans, Louisiana 70160
bcc: DSSE, Washington, D.C.

6AEL:JVeach:ma:X2142:9-30-76

6AEL	6AEA	6AEA	6AEA
Collins	Bernath	Fahrenthold	Doyle

APPENDIX D

Dec. 29, 1976

cc: Mr. James Coerver
Technical Secretary
Louisiana Air Control
Commission

Mr. T. G. Taylor
Technical Manager
PPG Industries, Inc.
P. O. Box 1000
Lake Charles, Louisiana 70601

Dear Mr. Taylor:

We have reviewed your letter of November 12, 1976 concerning the two steam generators of Powerhouse C.

As we stated in our letter of October 5, 1976, the applicability of the New Source Performance Standards (NSPS) depends solely on the facts relating to the types of equipment for which NSPS regulations have been issued. The regulations apply to a facility the construction or modification of which is commenced after the date of publication of any standard (or, if earlier, the date of publication of any proposed standard) applicable to that facility. The information you have provided shows that the commencement of the construction of the two steam generators was after the publication of the proposed regulation for fossil fuel fired steam generators. Even though you may have ordered equipment before

the date of the proposed regulations that would be completely useless without the steam generators, that action is irrelevant to determine the applicability of the regulations to the two steam generators.

We hope that this discussion makes it clear why the two steam generators are subject to the provisions of the Standards of Performance for New Stationary Sources, 40 CFR Part 60.

If you still desire to have a meeting discussing this determination, please contact Mr. James Veach of my staff by letter or by telephone at (214) 749-2142.

Sincerely yours,

ORIGINAL SIGNED BY

O. W. Lively
Acting Director
Enforcement Division

6AEL:JVeach:ma:X2142:1-26-76:

Retyped:12-6-76

6AEL	6AEA	6ARA
Collins	Bernath	Fahrenthold

APPENDIX E

PPG INDUSTRIES, INC./
ONE GATEWAY CENTER/
PITTSBURGH, PENNSYLVANIA 15222/
AREA 412/434-2145

GEORGE P. CHENEY, JR., Assistant Counsel

April 13, 1977

Mr. Howard Bergman
Director, Enforcement Division
Environmental Protection Agency
Region VI
1600 Patterson Street
Dallas, Texas 75201

Re: *Request for Determinations under 40 C.F.R. § 60.5.*

Dear Mr. Bergman:

By this letter, PPG Industries, Incorporated, ("PPG"), seeks a determination that construction of two "waste heat" boilers, components of "Power Plant C" at PPG's Lake Charles, Louisiana works ("Lake Charles works") was "commenced" within the meaning of Section 111(a)(2) of the Clean Air Act, as amended, 42 U.S.C. § 1857c-6, prior to August 17, 1971, the date of proposed "new source" emission regulations for fossil-fuel fired steam generators. Alternatively, PPG seeks a determination that the regulations for fossil-fuel fired steam generators do not apply to waste heat boilers such as those being installed at the Lake Charles works. This request for

determinations is submitted pursuant to 40 C.F.R. § 60.5 (captioned "Determination of construction or modification").

Power Plant C is a fully coordinated power generating system, composed of two gas turbine generators (producing electricity) and two "waste heat" boilers (producing process steam). The first of the gas turbines will begin operation by the end of April of this year, and the companion "waste heat" boiler is projected to go on line in June. The second set of such units (turbine plus "waste heat" boiler) is scheduled for start-up in the third quarter of 1978. The determinations sought by PPG are essential to clarify tentative findings contained in a letter from Mr. O. W. Lively, Acting Director, Enforcement Division, Region VI, dated October 5, 1976, which findings have been the subject of continuing subsequent correspondence and discussion.

Should it be determined both that construction of the "waste heat" boilers of Power Plant C was not "commenced" until after August 17, 1971, and that the new source regulations for fossil-fuel fired steam generators apply to such "waste heat" boilers, PPG by this letter seeks an interpretation of the regulations as applied to the "waste heat" boilers. Because of the manner in which the standards of performance are written (explicit formulas set out allowable emissions where specified fuels are used), they cannot be readily applied to the "waste heat" boilers. The regulations would in some way have to be adapted to take into account the fact that only part of the

heat used is created by the firing of fuel within the boilers themselves.

To aid in your consideration of this request, two memoranda are appended. Appendix A is a statement of the facts relevant to the determinations sought by PPG. Appendix B is a memorandum prepared by counsel based on those facts analyzing the relevant provisions of the Clean Air Act and implementing regulations.

The long and short of the matter is that the present regulations for steam generators seem to have been construed to prevent, or at least to tend to prevent, the possibility of "recapturing" waste heat, a very desirable goal, from both an energy conservation and economic standpoint. On the other hand, if the turbines were operated independently of the boilers, i.e., if no attempt were made to use the waste heat from the turbine exhaust in the boilers, full compliance with the EPA standards of performance could be achieved. This anomaly is especially troubling to PPG since the design of and course of construction for the combined turbine-"waste heat" boiler units was set in 1970, well before the advent of the standards of performance.

Very truly yours,

/s/ George P. Cheney, Jr.
GEORGE P. CHENEY, JR.
Assistant Counsel

cmr

Attachments

cc: Edward E. Reich

Director, Division of Stationary
Source Enforcement
Environmental Protection Agency
401 M Street, S. W.
Washington, D. C. 20460

APPENDIX F

ENVIRONMENTAL PROTECTION AGENCY

JUN 8 1977

CERTIFIED MAIL—RETURN RECEIPT
REQUESTED #560100

Mr. George P. Cheney, Jr.
Assistant Counsel
PPG Industries, Inc.
One Gateway Center
Pittsburgh, Pennsylvania 15222

Dear Mr. Cheney:

We have reviewed your letter of April 13, 1977, and the memoranda attached thereto, concerning the two "waste heat" boilers of "Power Plant C" at PPG's Lake Charles, Louisiana plant. We considered your letter as a request for reconsideration of the determination given in our letter of October 5, 1976. After consulting with the Division of Stationary Source Enforcement, we reaffirm our prior determination that the two "waste heat" boilers are subject to provisions of Standards of Performance for Fossil Fuel Fired Steam Generators, 40 CFR, Part 60, Subpart D.

As stated in our letter of December 22, 1976, to PPG, the determination of when a facility (subject to a Standard of Performance) commenced construction depends solely on the construction of that facility. Therefore, we cannot favorably consider your request that the commencement of construction of

two "waste heat" boilers be tied to the construction of the entire Power Plant C.

The two boilers each have the capability of operating at more than 250 million British thermal units per hour heat input. For this reason the boilers come within the scope of the Standards of Performance for fossil fuel fired steam generating units even though the boilers can burn a combination of fuel and turbine exhaust gases.

As to the question of how to determine compliance, on April 17, 1972, the Office of Enforcement ruled, in a similar case that:

> The combustion turbine facility clearly is not subject to the present Federal regulations, and both the combustion effluent and thermal energy from the turbine may be discharged to the atmosphere without being limited by the standards. There would be no logic, then in penalizing an owner or operator who chooses to use the exhaust heat, which otherwise would be wasted, in a waste heat recovery steam generator unit, with or without supplemental fuel.
>
> Accordingly, we agree that both the heat input and the emission contribution of the combustion turbine will be excluded in determining whether the steam generator plant complies with the standards. Compliance will be judged only on the amount of heat and combusion effluents added by supplemental fuel used in the waste heat recovery steam generator, which is the affected facility.

Therefore, it is necessary for the performance tests to be conducted on 100% fossil fuel.

If you have any additional questions on this matter, please contact Mr. James Veach at (214) 749-2142.

Sincerely yours,

/s/ J. Paul Camola for
John E. White
Regional Administrator

bcc: Larsen, DSSE
Knudson (6S&A)

6AEL:JVeach:ma:X2142:5-23-77

APPENDIX G

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D.C. 20460

August 18, 1977

OFFICE OF ENFORCEMENT

Mr. Charles F. Lettow
Cleary, Gottlieb, Steen and Hamilton
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Dear Mr. Lettow:

A re-examination of our August 3, 1977, letter to you concerning PPG's Lake Charles, Louisiana, waste-heat boilers reveals a misstatement of the applicable regulatory requirements affecting the PPG facility. On August 8, 1977, a member of my staff, Douglas Farnsworth, telephoned Mr. Douglas Kliever, of your firm, to notify him of the possible re-determination.

Our August 3, 1977, letter stated that your understanding was correct

> that except for the time of the performance test or other periods when a boiler is operating on 100 percent fossil fuel, the standards for fossil fuel-fired boilers would not apply to the operation of PPG's waste-heat boilers in their planned mode of operation (significant heat input from turbine exhaust gas) . . . .

That statement is not consistent with previous EPA determinations in similar cases, nor is it consistent with EPA Region VI's June 8, 1977, determination letter to Mr. George P. Cheney, Jr. of PPG. It is correct that during a performance test the boiler must operate at 100 percent fossil fuel. However, subsequent to the performance test, compliance will be judged on the amount of heat and emissions attributed to the fossil fuel used in the waste heat boiler. Thus, the standards of performance for a fossil fuel-fired steam generator will apply to the PPG facility at all other times after the performance test as well. However, compliance with the standard will be determined based on the heat input from the fossil fuel and the emissions directly related to the combustion of that fossil fuel. Any heat input or emissions caused by the waste-heat will be disregarded in determining compliance.

As stated in 40 CFR § 60.11(a), compliance with standards shall be determined only by performance tests established by 40 CFR § 60.8. However, sources subject to new source performance standards are required, pursuant to 40 CFR § 60.11(d), "to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions." Since PPG has chosen low sulfur fuel as the method for meeting the standard, the regulations require burning such fuel at all times subsequent to the performance test.

As was indicated to you during your August 17, 1977, telephone conversation with Doug Farnsworth and Rich Biondi of my staff, in-stack continuous monitors for NO_x and SO_2 will not have to be installed on the PPG facility. However, an opacity

monitor must be installed and operational prior to conducting performance tests (40 CFR 60.13(b)). In addition, PPG will be required to perform some form of alternative monitoring. This may include monitoring and reporting on the sulfur content of the fossil fuel burned in the boiler. PPG should contact our Region VI office in Dallas, Texas, to determine the specifics of the alternative monitoring requirements, as well as the opacity monitor.

The second point made in the August 3, 1977, letter which confirmed that PPG's Lake Charles, Louisiana, facility would not be subject to any new source performance standard for waste-heat boilers which might be proposed and promulgated in the future, is accurate in that a standard more stringent than the present one would not be applicable to the PPG facility.

I apologize for the incorrect statement made in our earlier letter. However, the position taken above is consistent with Region VI's original June 8, 1977, determination to PPG. If you have any questions on this matter, please contact Douglas Farnsworth of my staff at (202) 755-2570.

Sincerely yours,

/s/ Edward E. Reich
EDWARD E. REICH, Director
Division of Stationary
Source Enforcement

cc: Director, Enforcement Division
Region VI

Jack Farmer, SDB

☆ U. S. GOVERNMENT PRINTING OFFICE; 1979 295808 16

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1918

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY,

PETITIONERS

—*v.*—

PPG INDUSTRIES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FILED: JUNE 25, 1979
PETITION GRANTED: OCTOBER 1, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1918

ADLENE HARRISON, REGIONAL ADMINISTRATOR,
AND DOUGLAS COSTLE, ADMINISTRATOR OF
ENVIRONMENTAL PROTECTION AGENCY,
PETITIONERS

—*v.*—

PPG INDUSTRIES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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* The entire administrative record was included as a single exhibit in the record on direct review, with the separately numbered pages indicated here in brackets. The administrative record is included in entirety, except as noted.

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RELEVANT DOCKET ENTRIES

[Title of Court Omitted in Printing]

PPG INDUSTRIES, INC.

v.

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY

DATE	PROCEEDINGS
October 4, 1977	Petition for Review
November 10, 1977	Order granting motion of Continental Oil Company to Intervene
December 7, 1977	Certified list of administrative record filed
May 10, 1978	Case Argued
January 8, 1979	Opinion and judgment entered
January 22, 1979	Respondents' motion for extension of time to file petition for rehearing granted to February 5, 1979
February 5, 1979	Respondents' petition for rehearing and rehearing en banc
February 26, 1979	Order denying petition for rehearing and rehearing en banc
March 6, 1979	Judgment as mandate issued

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. ——

PPG INDUSTRIES, INC.
Box 1000
Lake Charles, Louisiana 70601, PETITIONER

v.

ADLENE HARRISON, as Regional Administrator,
Environmental Protection Agency
Region VI
1201 Elm Street
First International Building, Suite 2800
Dallas, Texas 75270

and

DOUGLAS M. COSTLE, as Administrator,
ENVIRONMENTAL PROTECTION AGENCY
401 M Street, S.W.
Washington, D.C. 20460, RESPONDENTS

PETITION FOR REVIEW

PPG Industries, Inc., hereby petitions the court for review of the orders and determinations of the Environmental Protection Agency (a) that two "waste heat" boilers, which are component parts of "Power Plant C" in the chemical manufacturing plant of PPG Industries, Inc. at Lake Charles, Louisiana, are subject to provisions of Standards of Performance for Fossil Fuel Fired Steam Generators, 40 C.F.R. § 60.40, *et seq.*; (b) that, pursuant to the Standards of Performance for Fossil Fuel Fired Steam Generators, PPG Industries, Inc. may fire in its waste heat boilers only a fuel which contains a sulfur content equal to or less than a sulfur level to be specified as a result of performance tests conducted in compliance with the Standards; and (c) that, pursuant to the Standards, PPG Industries, Inc. must install and

operate continuous opacity monitors in the stacks of the boilers in Power Plant C and also may be required to monitor and report on the sulfur content of the fossil fuel burned in the boilers. These orders and determinations were issued and entered on June 8, 1977, August 3, 1977, and August 18, 1977. They have not been published in the *Federal Register*.

Respectfully submitted,

/s/ Oliver P. Stockwell
OLIVER P. STOCKWELL
Attorney for Petitioner
Stockwell, Sievert, Viccellio,
Clements & Shaddock
One Lakeside Plaza
P.O. Box 2900
Lake Charles, Louisiana 70601
(318) 436-9491

/s/ George P. Cheney, Jr.
GEORGE P. CHENEY, JR.
Attorney for Petitioner
PPG Industries, Inc.
One Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 434-2145

/s/ Charles F. Lettow
CHARLES F. LETTOW
Attorney for Petitioner
Cleary, Gottlieb, Steen & Hamilton
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 223-2151

Dated: October 4, 1977

[Certificate of Service Omitted in Printing]

April 17, 1972

Key Letter

Mr. Milan C. Miskovsky
Debevoise & Liberman
Shoreham Building
Washington, D.C. 20005

Dear Mr. Miskovsky:

Your March 24 letter requested our advice regarding applicability of the Standards of Performance for New Stationary Sources (40 C.F.R. Part (8), particularly the nitrogen oxide standards, to a General Electric combined combustion turbine and steam generating plant purchased by a member of General Public Utilities Corporation for addition to the existing Gilbert electric generating station in New Jersey.

The combustion turbine facility clearly is not subject to the present Federal regulations, and both the combustion effluent and thermal energy from the turbine may be discharged to the atmosphere without being limited by the standards. There would be no logic, then, in permitting an owner or operator who chooses to use the exhaust heat, which otherwise would be wasted, in a waste heat recovery steam generator unit, with or without supplemental fuel.

Accordingly, we agree that both the heat input and the emission contribution of the combustion turbine will be excluded in determining whether the steam generating plant complies with the standards. Compliance will be judged only on the amount of heat and combustion effluents added by supplemental fuel used in the waste heat recovery steam generator, which is the affected facility.

We appreciate the concise explanation and clarity of your letter. Please communicate with us whenever we may be of assistance.

WILLIAM H. MEGONNELL
Director, Division of Stationary
Source Enforcement

cc: Region II—w/cy incg
Don Goodwin " "
Bob Baum " "
Bob Walsh " "

[Illegible material notations omitted in printing; italicized material is handwritten marginal notation]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

DATE: 2 Mar. 1976

SUBJECT: Determination of Applicability—
Chevron Oil Co., Perth Amboy, New Jersey

FROM: Attorney-Advisor, Enforcement Proceedings
Branch
Division of Stationary Source Enforcement

TO: Kevin Healy, Attorney
General Enforcement Branch
Enforcement Division, Region II

As per our telephone conversation of February 25, 1976, the following confirms our discussion of the applicability of New Source Performance Standards to new petroleum refining and storage facilities of Chevron Oil Co., to be located in Perth Amboy, New Jersey.

BACKGROUND

Chevron plans to construct new petroleum refining and storage facilities in Perth Amboy, New Jersey. A contract for construction of the off-plot facilities (storage tanks and vessels) was entered into in February of 1973. A construction contract for the on-plot (refining facilities, e.g. catalytic cracking units) was entered into on June 15, 1973. The source did an environmental impact study of the proposed facilities sometime prior to February 1973.

It must be noted that the applicability date for NSPS for petroleum refineries and storage vessels for petroleum liquids is June 11, 1973 (date of FR proposal for these standards). Where construction of facilities was commenced after that date, the facilities are subject to the applicable standard.

DISCUSSION

Clearly, the planned storage vessels at the Chevron facility are not subject to NSP since their construction

was contracted for prior to June 11, 1973 (i.e., in February 1973). The refining facilities, considered separately, would be subject to NSPS since the construction contract was entered into on June 15, 1973, four days after the proposal date of the standard. The company has claimed an exemption for the refining facilities based on the contract date for the storage vessels, arguing that the entire new construction is so integrated as to make the contract date for the off-plot facilities the "commerce construction" date for the on-plot facilities.

Storage vessels and refining facilities (e.g. catalytic cracking units, catalyst regenerators) are separate "affected facilities" within the definitions of 40 CFR Part 60. As such, they must be considered separate from each other for the purpose of NSPS applicability. Note that the definition of "construction" in 40 CFR § 60.2(g) means "fabrication, erection, or installation of an *affected* facility." Thus, the date for commencement of construction, where the contract for construction rather than actual physical changes to the site is used, applies separately to each of Chevron's contracts. The earlier contract date for the storage vessels cannot be used to "grandfather" the refining facilities as exempt from NSPS compliance. The date of the environmental impact study is irrelevant.

Because other information was unavailable to us, this affirmative applicability determination applies only to the "commencement of construction" issue, and does not speak to the process or design capacity requirements of 40 CFR Part 60.

/s/ Jean E. Vernet
JEAN E. VERNET

MAY 3 1976

CERTIFIED MAIL—
RETURN RECEIPT REQUESTED #789717

Mr. T. O. Taylor
Technical Manager
Industrial Chemical Division
PPG Industries, Inc.
P.O. Box 1000
Lake Charles, Louisiana [Illegible]

Dear Mr. Taylor:

On February 26, 1975 Conoco Oil Company notified this office that, as fuel supplier to PPG Industries, Conoco would have to switch from supplying natural gas to fuel oil for PPG's fossil fuel fired steam generators at the Lake Charles, Louisiana plant. On March 21, 1975 a meeting was held in Dallas that was attended by representatives of PPG, Conoco, the Environmental Protection Agency, and a representative of the Louisiana Air Control Commission. At this meeting the effects of the fuel switch in regard to the applicability of the New Source Performance Standards were discussed. On January 19, 1976 we wrote you requesting information on the status of the fuel switch. In a letter dated February 2, 1976 you informed us that the Louisiana Air Control Commission approved PPG's fuel oil permit application on July 9, 1975.

Under the provisions of the Clean Air Act, as amended, 42 U.S.C. 1857 et seq., the Administrator of the Environmental Protection Agency has promulgated Standards of Performance for New Stationary Sources [40 CFR Part 60]. Among the new and modified stationary sources to which Standards of Performance apply are fossil fuel-fired steam generating units [40 CFR Part 60, Subpart D, a copy of which is enclosed].

Facilities covered by Standards of Performance are subject to notification and recordkeeping requirements [40 CFR 60.7, a copy of which is enclosed].

A fuel switch from natural gas to fuel oil is probably a modification within the meaning of 40 CFR 60.14 (a copy of which is enclosed) unless the exception of 40 CFR 60.14(e)(4) applies. It is necessary for you to provide us information that will demonstrate whether or not the fuel switch is a modification and whether or not you come within the scope of 40 CFR 60.14(e)(4). Accordingly, pursuant to the authority granted in Section 114 and subject to the sanctions of Section 113 of the Clean Air Act (copies of which are enclosed) you are hereby required to complete Enclosure 1 to this letter. The completed Enclosure 1 is required to be submitted within twenty (20) days from the receipt of this letter to the Environmental Protection Agency at the following address:

U.S. Environmental Protection Agency
Region VI
1600 Patterson Street
Dallas, Texas 75201

Attn: Enforcement Division

Any change in the information so reported must be reported to the same office within five days after such change occurs. This continuing requirement to provide notification of change in the information covered by this letter remains in effect until expressly terminated in writing by this office.

In accordance with Section 114(c) of the Clean Air Act and the Freedom of Information Act, 5 U.S.C. Section 552, information provided to the Environmental Protection Agency in this report will be available to the public, except that upon a showing satisfactory to the Agency by any person that a specified portion (other than emission data), if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Agency will consider such information confidential in accordance with the purposes of 18 U.S.C. Section 1905. However, any such confidential information may be disclosed to other officers, employees, or authorized representative of the United States concerned with carrying out the Clean Air Act or when

relevant in any proceeding under the Clean Air Act. If you feel that you can justify confidential treatment for any of the information supplied, you should provide a fully detailed explanation for each specific item of information at the time that you respond to this letter. Whether or not you regard part of the information requested as confidential, you are required to furnish it in response to this letter.

Questions regarding your compliance with the New Source Performance Standards should be addressed to Mr. James Veach, Attorney, Enforcement Division, at (214) 749-2142.

Sincerely yours,

Original Signed By
THOMAS P. HARRISON, II
Director
Enforcement Division (6AE)

Enclosures

1. Enclosure 1
2. 40 CFR 60.7
3. 40 CFR Part 60, Subpart D
4. 40 CFR 60.14
5. Sections 113 and 114 of the Clean Air Act

cc: Mr. James F. Coerver
Technical Secretary
Louisiana Air Control Commission
P.O. Box 60630
New Orleans, Louisiana 70160

bcc: Bill McNally, (6AEA)

6AEL: JVeach:ma:X2142:R1135:4/29-76

JV 4/29

6AEL *JC* 6AEA [Illegible]

Collings Doyle

When info on increase in pollutants comes back we may still have to call/write whether company calculations/ projects whether an increase will occur.

bcc: George Stevens, DSSE

[italicized portions appears as handwritten notations in record]

Enclosure 1

Required Information to be Submitted

Provide the following information for each fossil fuel-fired steam generating unit of more than 250 million British thermal units per hour heat input, the construction or modification of which was commenced after August 17, 1971.

1. List each steam generating unit that has changed or will change from burning natural gas to burning fuel oil and the date of each change.

2. If any of the steam generating units listed in number 1, above, were designed prior to August 17, 1971, to accommodate the use of fuel oil, provide documentation of such designed use for each such unit.

3. List the changes that were or will be made to each steam generating unit that allows it to burn fuel oil, and the date such changes were or will be begun on each such unit.

4. Provide all available information and documentation on the change in emission of any pollutant from each unit as a result of the fuel switch from natural gas to fuel oil.

[PPG Emblem]

PPG INDUSTRIES, INC.
Industrial Chemical Division
P.O. Box 1000
Lake Charles, La. 70601

T. G. TAYLOR
Technical Manager

May 14, 1976
Certified Mail—Return Receipt Requested

Mr. Thomas P. Harrison, II
Director—Enforcement Division (6AE)
U.S. Environmental Protection Agency
Region VI
1600 Patterson Street
Dallas, TX 75201

Re: Enclosure I, Thomas P. Harrison to T. G. Taylor, May 3, 1976

Dear Mr. Harrison:

We believe that all answers and documentation to the four questions raised in your Enclosure I are found in PPG's application to the Louisiana Air Control Commission dated May 26, 1975, for fuel oil burning in our complex. A copy of this document was forwarded to you last year by the LACC. For your convenience, however, those sections containing answers to your Enclosure I questions are reproduced and included herein.

The fuel oil permit application covers two situations. The first situation is that we must convert some of our existing combustion equipment from gas to oil feed due to supply problems. Since all of the equipment to be converted was originally designed for fuel oil feed and in operation prior to 1971, the fuel switch is a modification within the meaning of 40 CFR 60.14. This conversion is now partially completed.

The second situation covered by our permit is the construction of a new power facility to combust either gas

or oil. This new facility was designed and equipment was ordered in 1970. Numerous problems delayed the start of construction until late last year.

[handwritten and illegible marginal notes omitted]

The monitoring devices required of a new emission source are being incorporated into the design of this facility. Startup of this unit is still a year in the future; consequently, you have not directly received information on the unit.

Sincerely yours,

/s/ T. G. Taylor
Technical Manager

edh

cc: J. F. Coerver
R. J. Samelson/G. P. Cheney
J. R. Farst
J. E. Wyche
C. A. Burns

Enclosure 1

Required Information to be Submitted

Provide the following information for each fossil fuel-fired steam generating unit of more than 250 million British thermal units per hour heat input, the construction or modification of which was commenced after August 17, 1971.

1. List each steam generating unit that has changed or will change from burning natural gas to burning fuel oil and the date of each change.

2. If any of the steam generating units listed in number 1, above, were designed prior to August 17, 1971, to accommodate the use of fuel oil, provide documentation of such designed use for each such unit.

3. List the changes that were or will be made to each steam generating unit that allows it to burn fuel oil, and the date such changes were or will be begun on each such unit.

4. Provide all available information and documentation on the change in emission of any pollutant from each unit as a result of the fuel switch from natural gas to fuel oil.

Reply to Enclosure 1

(1) Units 5, 6, 7, 8 and 9 at Powerhouse A, and Units 2 and 3 at Riverside Powerhouse will be modified to accept fuel oil as well as natural gas. Units 1 and 2 at Powerhouse C will be constructed to combust natural gas and/or fuel oil. This information is contained on pages 2 and 2A.

(2) All Powerhouse A and Riverside boilers were originally designed for either gas or fuel oil operation. Predicted performance data and certified construction drawings are presented in Appendix IV with Exhibits A-F.

Note: Powerhouse A boiler heat releases are less than 250 MM Btu/hr. each.

(3) The fuel oil system for all boilers is still under construction. Page 5 contains a brief description of the oil system; page 2A shows the chronology. Exhibit V explains the mode of operation of the new units. SK-7333 is a schematic of the oil system.

(4) The EIQ submitted in association with the permit application and dated 3/17/75 presents the new emission data predicted from each boiler as a result of fuel oil combustion. A page 6 from the EIQ is presented for each unit.

Show ownership and use of adjoining property on map section or list below.

List any residential areas near the plant or establishment and give distance from the plant or establishment:

See Exhibit I Plant Layout/Land Allotment

Location of Power Plant Stacks

Fuel Oil Permit

PPG Drawing 32A-6022-F.O.

3. LOUISIANA AIR CONTROL COMMISSION EMISSION INVENTORY QUESTIONNAIRE.

A completed Emission Inventory Questionnaire (copy attached) is required. If a new 6 page questionnaire for this location has been previously submitted, give date of submission February 1975. A completed "revised" Emission Inventory Questionnaire must also be submitted with this application. The Emission Inventory Questionnaire must be completed showing the entire emissions of the facility after modifications and/or additions, with max. concentration calculations under worst ambient air conditions.

Estimated starting date of construction: Power Plts. A, B, C (See Pg. 2A)

Estimated date operation will begin: See Page 2A.

Old Facility: Power Plts. A & B Operating

Addition: No

New Facility: Power Plt. C

Addition: Yes

"Give a brief description of proposed action and attach such information as flow diagrams, schematic diagrams, drawings, etc. needed to convey an understanding of the processes involved in the plant or establishment."

Due to the notice of curtailment of our natural gas contract by one of our suppliers, PPG is required to use fuel oil for a major percentage of their fuel needs. Seven boilers now in operation using natural gas will be converted to burn fuel oil. The chlorine expansion, Permit 290, has two new boilers that will burn fuel oil and/or natural gas. Therefore, nine boilers will be converted for the burning of fuel oil. They are as follows: (1) *Power Plt. A*—Nos. 9, 8, 7, 6, 5. No. 5 boiler will be a spare for outages of boilers #9 through 6. Stack numbers are the same as boiler numbers. (2) *Power Plt. B* (Riverside)—Nos. 3 and 2. The No. 3 boiler stack is being raised to the same height as No. 2, 150 ft. Stack num-

bers are 12 and 11, respectively. (3) *Power Plt. C*—Nos. 1 and 2 with stack Nos. 6-73 and 5-73, respectively. The schematic showing boiler arrangements is as follows: *Exh. II*—Routing of fuel oil fed to boilers; *Exh. III*—Plan View of Boilers Plt. A; *Exh. III-A*—Plt. B; *Exh. III-B*—Plt. C; *Exh. IV*—Boiler elevation and stack heights Plant A, Boilers 1 thru 9; *Exh. IV-A* and IV-B—Boilers 2 and 3; *Exh. IV-C*—Boilers 1 and 2.

Five on-the-line fuel oil tanks are being installed, four for No. 6 and one for blending low sulphur fuel oil with the No. 6 fuel oil to maintain ambient air at acceptable SO_2 environmental levels. The fuel oil will be burned at a nominal rate of 9,692 BPD.

Power Plants	Estimated Starting Date of Construction	Estimated Date Operation Will Begin
Power Plt. A		
Boiler #9	December 1, 1975	January 26, 1976
Boiler #8	January 26, 1976	March 15, 1976
Boiler #7	March 15, 1976	May 3, 1976
Boiler #6	May 3, 1976	June 21, 1976
Boiler #5	June 21, 1976	August 9, 1976
#5 Boiler will be a spare for outages of Boilers #9 through #6.		
Power Plt. B (Riverside)		
Boiler #3	September 29, 1975	December 1, 1975
Boiler #2	December 1, 1975	February 2, 1976
Power Plt. C		
Boiler #1	January 1, 1976	February 1, 1977
Boiler #2	July 1, 1977	August 1, 1978

List the air pollution abatement measures that will be utilized to control the emissions from the sources for the plant or establishment. If no facilities are contemplated, list the steps which will be taken to prevent the emission of sufficient quantities of pollutants to result in undesirable levels. Give the source and then the abatement method for each source. Please include information such

as drawings, manufacturer literature, specification, capacities ad efficiencies needed for evaluation of such control equipment and techniques used in controlling each source. Please include date that each estimated date operation will begin. Any information about the method used for abateing the source will facilitate the evaluation of the application.

The new burners and soot blowers to be installed in the designated boilers will incorporate the latest technology to consume the liquid fuels as cleanly and efficiently as possible. The system is designed for 9,692 BPD of fuel oil. The typical rate of burning will be lower, resulting in lower SO_2 emissions than indicated in Appendix I—Ambient Air—Max. Concn. of Pollutants with 1 Wt. % S Fuel Oil. Expected plan of boiler operations is given in Appendix II. Boiler sizes are shown as Appendix III as MM BTU/Hr.

In order to continuously meet the primary standards for SO_2, the following will be done:

1. Monitor ground level SO_2 concentration as required by the LACC.
2. Extend the stack of our existing No. 3 boiler at Riverside from 100′ to 150′.
3. Install storage capacity and equipment so that fuel oil blending can be accomplished to provide environmental acceptance of fuel oil during adverse SO_2 levels of 365 ug/m^3 in ambient air. Blending will be accomplished using a low sulphur fuel oil with the No. 6 oil.
4. Supplier's letter of intent of February 5, 1975, to furnish fuel oil that can be blended with 1 wt.% S fuel oil whenever monitors detect that an emergency SO_2 condition exists, is Exhibit V.
5. We plan to design foundations and structure of new boiler stack at Power Plant C—#1 and #2 so that they may be extended.

APPENDIX V

POWER PLANT C
COMBINED FLUE GASES FROM GAS TURBINE AND WASTE HEAT BOILER BURNING GAS OR OIL

PPG Industries asks that the calculation of emissions rate from its two boilers at Power Plant C, now under construction, be done for normal operating conditions when determining compliance with EPA regulations. Following are the reasons for the request:

Abstract

PPG Industries is constructing a combined cycle power-steam generating plant at its Lake Charles, Louisiana, chemical complex. Under normal operation, the flue gas from a gas turbine generator exhausts directly into a waste heat boiler where additional fuel is fired. The flue gases from both units are inseparably mixed and emitted through a single stack to the atmosphere. Both units have heat releases greater than 250 MM BTU/hour. PPG is requesting that it be allowed to consider the total heat release from both units when determining the emissions rate from the stack to the atmosphere. PPG has acquired a permit from the Louisiana Air Control Commission to construct this plant; however, the permit is based on total gas firing, a requirement that can apparently no longer be met by our fuel suppliers.

Equipment Definition

PPG Industries is constructing a combined cycle power plant to furnish its Lake Charles, Louisiana, chemical complex with both electrical power and process steam. Predicted maximum output after project completion in 1979 will be the following:

149	megawatts electrical power
466,000	pounds/hour 400 psig steam
730,000	pounds/hour 175 psig steam

Equipment configuration will be two GE gas turbine generators in parallel, each discharging its hot turbine exhaust gases in its respective waste heat boiler. Additional fuel is supplied to the waste heat boilers to provide sufficient heat for steam generation to feed a backpressure turbogenerator. It is from this steam turbine that 175 and 400 pound process steam is obtained. No steam is condensed to produce electrical power. The gas turbines are designed to burn natural gas; the waste heat boilers can burn either gas or oil. The total heat input to one gas turbine plus one waste heat boiler is 1312.7 MM BTU/hour, of which 714.4 MM BTU/hour is supplied by the gas turbine.

Operation

Normal operation is described under Equipment Definition; however, each unit may operate individually at a sacrifice to overall economy. The on-stream factor of all units operating continuously is 95%. Thus, any operating configuration other than with both gas turbines, both waste heat boilers, and the waste heat generator on line is defined as an upset condition.

Compliance with EPA Regulations

Paragraphs 60.42, 60.43, and 60.44 of the Federal Register * (Vol. 39, No. 116—Friday, June 14, 1974) set forth the current emission regulations (particulate, SO_2, and NO_x) being applied to boilers with heat released greater than 250 MM BTU/hour and burning fossil fuels. As previously described, our proposed combined cycle generating station fires natural gas in a gas turbine generator which is not normally vented to the atmosphere. The hot flue gases are used to supply part of the combustion air and heat input to the waste heat boiler. These gases, then, combine with the flue gases from the supplemental fuel fired in the waste heat boiler and are vented together in a single stack. In view of this situation, we are asking that the emission regulations be applied to the total heat input to the system—not just the supplemental fuel heat input at the wase heat boiler.

* Attached.

ITEM NO. 5 EMISSION INVENTORY QUESTIONNAIRE (Revised 11/74) Page 6 of 9 (Suggested)

This page is to be used to record the data from one stack (or other emission point) only. Photocopy as many times as there are individual emission points, and use one page for each point. Note that the numbers indicate explanatory notes on pages 4 and 5.

Point source ID number[1]	Descriptive name of the equipment served by this stack	Height of stack above grade[2]	Stack diameter[3]	Stack gas exit temperature
6-73	Powerhouse C No. 1 Boiler	70 ft	15.75 ft	300°F

Stack gas flow rate at process conditions, not at standard	Stack gas exit velocity	If this stack serves a "boiler"[4], give the type(s) of fuel used and the heat input (i.e., fuel rate x heating value)	% of annual throughput of pollutants through this emission point (totals 100%)				Normal operating time of this point		
		#6 Fuel Oil type(s) of fuel	Dec-Feb	Mar-May	June-Aug	Sept-Nov	hrs/day	days/week	wks/yr
593,117 ft³/min	51 ft/sec	398.3 10^6 BTU/hr 1st fuel	25 %	25 %	25 %	25 %	24	7	52
		____ 10^6 BTU/hr 2nd fuel, if any							

Name of pollutant	Pollution control equipment code 5	Control equipment efficiency 6	Average emission rate lbs/hr	Maximum emission rate lbs/hr	Annual emission rate tons/yr	Emission estimation method 7	Add, change or delete code 8	Concentration in gases exiting the stack 9
particulate matter	000		65.3	103.9	285	6	Add	.02gr/std ft³
sulfur dioxide	000		650.0	1038.0	2847.0	6	Change	158 ppm (vol)
nitrogen dioxide	000		667.8	667.8	2925.0	6	Change	
hydrocarbons	000							
carbon monoxide	000		23.6	23.6	103.3	6	Change	

Fill in this column only as required by note 9.

If this stack is from equipment which burns fuel, give the % of the total fuel used by the equipment which is used, either directly or indirectly, for space heating (or cooling) at the plant. (i.e., to heat or cool the air in a room) If this stack is not from a fuel burning equipment, or if fuel is burned but none of the heat is intended to heat or cool air in a room, enter a zero below:

0 % "space heat"

Give below the fuel or process materials charging rate to the unit served by this stack.[11]

Name of fuel/ process material	Annual rate	Maximum hourly rate
#6 Fuel Oil	35,382 /yr	6.5 M gal /hr
	/yr	/hr
	/yr	/hr
	/yr	/hr
	/yr	/hr
	/yr	/hr

ITEM NO. 5 EMISSION INVENTORY QUESTIONNAIRE (Revised 11/74) Page 6 of 9 (SUPP

This page is to be used to record the data from one stack (or other emission point) only. Photo as many times as there are individual emission points, and use one page for each point. Note that the numbers indicate explanatory notes on pages 4 and 5.

Point source ID number[1]	Descriptive name of the equipment served by this stack	Height of stack above grade[2]	Stack diameter[3]	Stack gas exit temperature
5-73	Powerhouse C No. 2 Boiler	70 ft	15.75 ft	300 °F

Stack gas flow rate at process conditions, not at standard	Stack gas exit velocity	If this stack serves a "boiler"[4], give the type(s) of fuel used and the heat input (i.e., fuel rate x heating value)	% of annual throughput of pollutants through this emission point (totals 100%)				Normal operating time of this point		
		#6 Fuel Oil type(s) of fuel	Dec-Feb	Mar-May	June-Aug	Sept-Nov	hrs/day	days/week	wks/yr
593,117 ft³/min	51 ft/sec	596.3 10^6 BTU/hr 1st fuel	25 %	25 %	25 %	25 %	24	7	52
		____ 10^6 BTU/hr 2nd fuel, if any							

Name of pollutant	Pollution control equipment code[5]	Control equipment efficiency[6]	Average emission rate lbs/hr	Maximum emission rate lbs/hr	Annual emission rate tons/yr	Emission estimation method[7]	Add, change or delete code[8]	Concentration in gases exiting the stack[9]
particulate matter	000		65.3	103.9	285	6	Add	.02 gr/std ft³
sulfur dioxide	000		650.0	1038.0		6	Change	158 PPM (VOL)
nitrogen dioxide	000		667.8	667.8		6	Change	
hydrocarbons	000		-					Fill in this column only as required by note 9.
carbon monoxide	000		23.6	23.6		6	Change	

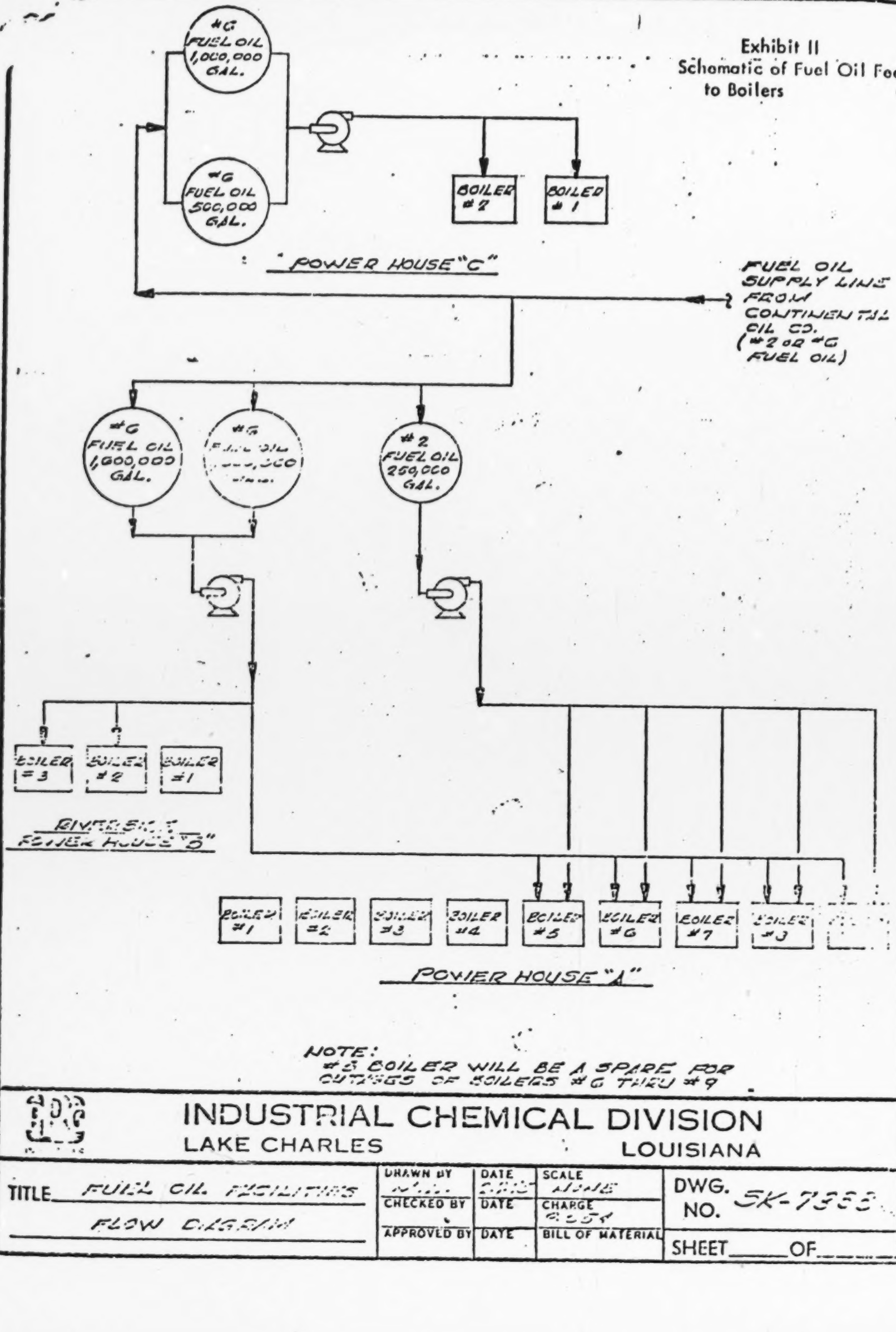
If this stack is from equipment which burns fuel, give the % of the total fuel used by the equipment which is used, either directly or indirectly, for space heating (or cooling) at the plant. (i.e., to heat or cool the air in a room) If this stack is not from a fuel burning equipment, or if fuel is burned but none of the heat is intended to heat or cool air in a room, enter a zero below:

0 % "space heat"

Give below the fuel or process materials charging rate to the unit served by this stack.[11]

Name of fuel/ process material	Annual rate	Maximum hourly rate
#6 Fuel Oil	35,382 /yr	6.5 M gal. /hr
	/yr	/hr
	/yr	/hr
	/yr	/hr
	/yr	/hr
	/yr	/hr

Exhibit II
Schematic of Fuel Oil Feed to Boilers



NOTE:
#8 BOILER WILL BE A SPARE FOR CUTAGES OF BOILERS #6 THRU #9

DOW

INDUSTRIAL CHEMICAL DIVISION
LAKE CHARLES LOUISIANA

TITLE FUEL OIL FACILITIES FLOW DIAGRAM	DRAWN BY	DATE	SCALE NONE	DWG. NO. SK-7333
	CHECKED BY	DATE	CHARGE	
	APPROVED BY	DATE	BILL OF MATERIAL	SHEET ____ OF ____

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: NSPS applicability to PPG DATE: 5/25/76

FROM: Jim Veach

TO: Paul Fahrenthold

Please review the PPG documents to see if PPG has documented that its Powerhouse and Riverside Powerhouse boilers were designed prior to August 17, 1971 to burn oil

If PPG can document that Power Plant C was purchased prior to Aug 17, 1971, it will be exempt. See if there is any thing in these papers on when C was purchased.

P

EPA Form 1320-6 (Rev. 6-72)

PPG Boiler Summary

Unit #	Size MMBTU/hr	Fuel fired	Design/Constr.
PH "A":			
5	< 250	fuel oil / natl gas	
6	< 250	" "	
7	< 250	" "	
8	< 250	" "	
9	< 250	" "	
PH "C"			
1	398.3		New?
2	598.3 - should be 398.3!		New?
RS ("B")			
#1	~ 420	~~[illegible]~~? - this is correct!	
#2	508.8	#6 (Bunker) fuel oil / natl gas	
#3	842.5	#2 "	

(margin notes: no evidence for capacities < 250 MMBTU/hr — specs ... all checked with state; documented in letter of 6-28-?? GG; combined with ... ; no evidence for order in 1970. ... document this! 3rd ¶ of letter; need to determine whether piping ... for #2, 3 or all units)

RS or "B"

Units #1, #2 and #3 originally designed to burn fuel oil or nat'l gas.

DWG 68 11019-3 | RS unit #3 designed in 1967 — not installed!

DWG 68-8010 | RS unit #2 fuel oil lines revised for one unit — which unit?

DWG 68-8022 | RS units designed for fuel oil usage — which units? are piping dwgs typical for 3 units?

ENVIRONMENTAL PROTECTION AGENCY

4.5.2.

JUN 02 1976

Mr. T. G. Taylor
Technical Manager
PPG Industries, Inc.
P.O. Box 1000
Lake Charles, Louisiana 70601

Dear Mr. Taylor:

Your letter and attachments of May 14, 1976 were received by the Enforcement Division on May 24, 1976. A thorough evaluation of the information contained in your response to our inquiry has been made. The conclusion reached by our staff is that your submission is insufficient in three areas to clearly demonstrate that the fuel conversion of the boilers in powerhouses A, B and C are exempt from NSPS.

On May 26, 1976 Mr. Paul Fahrenthold of my staff discussed the specific items needed to complete our evaluation with Mr. C. A. Burns of your staff. Mr. Burns requested that the items requested of him be confirmed by letter.

Therefore, we now require that you supply the following information, as an extension of our letter to you of May 3, 1976, which was issued under the authority of Section 114 of the Clean Air Act, as amended.

Information which you submitted to us alleges that boilers No. 5 thru 9 of Powerhouse A have a heat input of less than 250 X 10^6 BTU/hr. The pages of the EIQ you submitted to the State of Louisiana wherein these boilers are listed as emission points specifies the value of 219.6 X 10^6 BTU/hr for each unit. We require that you provide us a copy of a file document indicating the capacity of the units as guaranteed or certified by the boiler manufacturer.

O.K.—Gol.

O.K.—may be reserved Gol.

According to your letter of May 14, 1976, the two boilers which are part of the combined-cycle power plant of Powerhouse C were ordered in 1970, prior to the promulgation of NSPS for fossil fuel fired steam generators. Documentation from the equipment supplier or your purchasing department is required to establish the fuel firing capacity of the boilers and their exact purchase date.

Mr. Burns responded to our request as to the fuel used in Riverside (Powerhouse B) boiler No. 1 by stating that the unit would continue to be fired by natural gas. Based on the information you have submitted we have concluded that Riverside units No. 2 and 3 were designed to use oil as well as natural gas as fuel. The drawings, 6B-8019 and 6B-8088, which you submitted as evidence of your use of oil in these boilers are confusing in that they show a fuel oil system originally installed in 1943 and modified in 1950, but do not clearly label which boilers of the Riverside station are being fed by the fuel oil system. Please explain which boilers were/are being fed by the fuel oil system shown in the drawings, and confirm Mr. Burns' statement that Riverside Boiler No. 1 uses only natural gas as fuel.

O.K.—Gol.

At this time we feel that the supplemental information requested above will be adequate to allow a determination to be made as to the applicability of NSPS to the above boilers.

Should you feel that additional discussion will expedite a timely response to our request, please call Paul Fahrenthold of my staff at (214) 749-2142.

Yours very truly,

Original Signed By

THOMAS P. HARRISON, II
Director, Enforcement Division
Air Compliance Branch

[Routing and concurrence notation omitted in printing; italicized portions are handwritten marginal notes]

[PPG Emblem]

PPG INDUSTRIES, INC.
Industrial Chemical Division
P.O. Box 1000
Lake Charles, La. 70601

June 28, 1976

[Received June 31, 1976]

4.5.2.

m/Crocker For evaluation—John pls. refer to my letter to PPG for the quote needing clarification.

Mr. Thomas P. Harrison, III, Director
Enforcement Division
Air Compliance Branch
U.S. Environmental Protection Agency
Region VI
1600 Patterson
Dallas, TX 75201

Dear Mr. Harrison:

The following explanation and attachments are forewarded as an extension of our May 14, 1976, letter. We believe this, in combination with our present application to the Louisiana Air Control Commission, will provide sufficient documentation to answer all the questions you have raised concerning our fuel oil conversion and power expansion project.

(a) Re: Heat release of Powerhouse A boilers:

Attachments A and B show the capacity and fuel consumption of the Powerhouse A boilers as a result of the last modification completed in 1955. The boilers are run continuously at 175 M#/Hr. steam rate and consume slightly less fuel than the predicted 231 MM BTU/Hr. on B.

(b) Re: Power expansion:

Attachments C and D are the purchase orders to G.E. for the gas turbine generator and to Combustion Engineering for the waste heat boiler. The reason for the great disparity in dates of order is that the project was temporarily placed on hold in 1971 until long-term arrangements could be ironed out with one of our fuel suppliers. The waste heat boiler order was cancelled; however, the gas turbine order was not because it was a long-delivery item.

Attachment E is the cover letter of the equipment manual sent out to the general contractors bidding on the expansion on February 16, 1971.

Attachment F is the section of the bidding manual specifying the waste heat boiler and fuels.

Attachment G is the predicted performance of the waste heat boiler.

Attachment H is the predicted performance curve of the gas turbine purchased from G.E.

(c) Re: Riverside Powerhouse:

The Riverside Powerhouse consists of three units, each installed at a different time. Drawing 6B-8088 shows the fuel oil installation pertaining to the first unit constructed in 1943. The boiler on this unit has 4 burners which are schematically shown on the drawing. In 1950, additional fuel oil equipment was added to the original system to accommodate installation of the No. 2 unit. The boiler for this unit has 6 burners, which are schematically shown on the drawing. In 1969, the No. 3 unit was installed. The boiler for this unit has 6 burners, which are schematically shown on drawing 6B-11019.

The fuel oil systems, depicted in the above 3 drawings are presently in the process of being modernized.

In our permit to the LACC, we asked for exemption of all three Riverside units under paragraph 60.14 subpara-

graph e, item 4 (CFR Vol. 39, No. 200—Tuesday, October 15, 1974) since they were all designed for oil and installed prior to 1971. At this time, we are not projecting the need to fire the No. 1 unit on oil and have so stated in our permit application. If, in the future, we find it necessary to fire the No. 1 unit on oil, at least some of the paperwork will have been done in order to expedite its operation.

Sincerely yours,

/s/ *T. G. Taylor*
T. G. TAYLOR
Technical Manager

TGT/jma

cc: J. C. Coerver
R. J. Samelson/G. P. Cheney
J. R. Farst
J. E. Wyche
C. AR. Burns

[Italicized portion is handwritten notation]

ALL QUOTATIONS AND SALES ARE SUBJECT TO THE CONDITIONS PRINTED ON THE BACK OF THIS PAGE

Established 1890

A. M. LOCKETT & COMPANY
LIMITED
Contracting Mechanical Engineers
Complete Steam Power & Pumping Plants
New Orleans 7, La.

BRANCH OFFICES
HOUSTON
DALLAS

June 9, 1955

B&W Boiler Contracts F-414 and R-512

Mr. Russell Clark, c/o
Columbia Southern Chemical Corp.
P.O. Box 900
Lake Charles
Louisiana

Dear Mr. Clark:

This will confirm your telephone conversation with Frank Gault concerning the possible increase in capacity of your existing boilers to possibly 175,000 lbs. of steam per hour. While the Babcock & Wilcox Company would not wish to assume any contractual obligation on these old boilers, we are pleased to advise you as follows:

Based on circulation, the boilers should be able to obtain a capacity of 175,000 lbs. of steam per hour. The limiting factor is the capacity of the cyclone separators. The maximum capacity of the cyclones with the horizontal type scrubbers over them that are in your boilers is rated by us at 95000 lbs. of steam per hour each when you are operating at 620 psig. Unfortunately in the drum that you have we cannot put the newer type inclined scrubbers as there isn't enough room.

We would suggest that you attempt to obtain the 175,000 lbs. of steam per hour from your boilers. While doing this you could make carryover tests to determine how much carryover there will be. If you cannot obtain the quality of steam you need, it is possible for us to add four more cyclone separators in each drum; but we feel that before you invest any money in additional equipment you should try to see if you can get your 175,000 lbs. of steam per hour with satisfactory steam quality.

This Was Done

We are sending you a proposal on a duplicate unit for No. 9; and you will note in the proposal we are setting it up for 150,000 lbs. of steam per hour as the old ones are. Of course, the additional cyclones could be put in initially on the new unit at slight additional cost.

We are also checking into the air heater situation about which you spoke to our Mr. Gault.

Yours truly,

A. M. LOCKETT & COMPANY, LTD.
/s/ *F. Robert Mendow*
F. R. MENDOW
Chief Engineer

FRM:mk

cc: FCGault—Lake Charles

[Italicized notation appears as handwritten notation in margin in record]

A — FUEL AS FIRED

SOURCE	SAMPLES	
	ANALYSES	
SOLID	KIND	
A.S.T.M.	CLASS	
	GROUP	
SOURCE	MINE	
	SEAM	
	DISTRICT	
	COUNTY	
	STATE	
	SIZE	
	GRINDABILITY	
	SURFACE MOIST., %	
	% MOISTURE	
PROX. ANAL.	VOL. MATTER	
	FIXED CARBON	
	ASH	
	TOTAL	
ASH TEMP F	— / REDUCING / OXIDIZING	
	INIT DEF	
	SOFTENING	
	LIQUID	
LIQUID	KIND	[illegible]
	GRAVITY, DEG A.P.I.	
		STRIPPER [illegible]
GASEOUS	KIND	NATURAL
	SP GR REL TO AIR	
ULTIMATE ANALYSES	FUEL	[illegible]
	% BY	[illegible]
	ASH	
	S	
	H_2	
	C5H12	0.7
	CH_4	[illegible]
	C3H8	[illegible]
	C_2H_6	3.0
	C4H10	.7
	CO_2 —	.2
	SO_2	
	H_2O	
	N_2	
	O_2	
	TOTAL	
	BTU/LB	[illegible]
	BTU/CU FT AT 60 F, 30 IN. HG	1104

B — PREDICTED PERFORMANCE

	STEAM, ACTUAL, M LB/HR	150	175
	TYPE OF FUEL	NAT. GAS	NAT. GAS
	RATE AND LOAD DURATION, HR	CONT.	CONT.
	EXCESS AIR LEAVING %	15	15
	BURNERS, NO. IN USE PER FURNACE	4	4
QUANTITIES M LB/HR	CONTINUOUS BLOWDOWN	[illegible]	[illegible]
	FUEL M CF/H	17.3	[illegible]
	FLUE GAS LEAVING	174	204
	AIR LEAVING A.H.	152	177
PRESSURES LB/SQ IN.	STEAM AT S.H. OUTLET	[illegible]	620
	MIN. OPER. IN BOILER DRUM	650	660
	DROP, DRUM TO S.H. OUTLET	30	40
	DROP THRU ECON		
TEMPERATURES F	SUPERHEATED STEAM	735	750
	FLUE GAS LEAVING BLR	650	715
	FLUE GAS LEAVING ECON		
	FLUE GAS LEAVING A.H.	342	352
	WATER ENTERING ECON		
	WATER ENTERING BLR	325	325
	AIR ENTERING A.H.	80	80
	AIR LEAVING A.H.	530	555
DRAFT LOSSES IN. OF WATER	FURNACE	.10	.10
	BOILER AND SUPERHEATER	1.9	2.6
	ECONOMIZER		
	AIR HEATER	2.9	4.0
	DAMPERS } ASSD	.8	1.0
	FLUES		
	NET DRAFT LOSS	5.7	7.6
AIR RESISTANCE IN. OF WATER	BURNER AND WINDBOX	3.2	4.3
	DUCTS	.8	1.0
	AIR HEATER	2.0	2.8
	NET RESISTANCE	6.0	8.1
HEAT LOSSES %	DRY GAS	4.12	5.12
	H_2 AND H_2O IN FUEL	10.63	10.49
	MOISTURE IN AIR	.14	.14
	UNBURNED COMBUSTIBLE		—
	RADIATION	.66	.56
	UNACC FOR & MFRS. MARG	1.50	1.50
	TOTAL HEAT LOSS	17.85	18.01
	EFFICIENCY OF UNIT, %	82.15	81.99
	MAX ALLOWABLE BOILER CONC, PPM	2000	2000
	[illegible] IN STEAM PPM	1.0	1.0
PULVERIZER	NO. IN USE PER FURNACE		
	AIR TEMP TO PULV, F		
	TOTAL POWER, KW HP/TON		
	% THRU NO. 200 U.S. SIEVE		
	% THRU NO. 50 U.S. SIEVE		

C

BOILER	TYPE
	NO.
	DESIG.
SUPERHEATER	TYPE
ECONOMIZER	TYPE
	DESIG.
AIR HEATER	TYPE
FUEL BURNER	TYPE
	STOKER
	REQUIR. AT BUR.
PULVERIZER	TYPE
	NO./F.
	FEEDER
FURNACE VOLUME AND WALL AREAS	WIDTH
	TOTAL
	TOTAL
F-D FAN	NET PE
	TEST B
I-D FAN	NET RE
	TEST B
STACK	HEIGHT
	CONS. P
DRIVES	

PULVERIZER SIZE BASED ON % THRU NO. 200 U.S. SIEVE AND GRINDABILITY, FOR % SURFACE MOISTURE THE REQUIRED AIR TEMPE[RATURE]

PREDICTED PERF. IS BASED ON COMBUSTION AIR ENTERING UNIT AT 80 F, 60% RELATIVE HUMIDITY, 0.013 LB MOISTURE/LB DRY AIR, 29.92 IN.

ON CONDITIONS AND EQUIPMENT GIVEN ON THIS SUMMARY SHEET, AND ON ARRANGEMENT SHOWN ON DRAWING

BY [illegible]	CH'D	SUMMARY SHEET THE BABCOCK & WILCOX CO.
S 11/[illegible] C 11/[illegible]	APPD	P-32[illegible]

FORM 2757-13 RECORD

CHEMICAL DIVISION
ONE GATEWAY CENTER
PITTSBURGH, PA 15222

INDUSTRIES

ORDER NO 267-001 — C

REQUESTED BY	REQUISITION NO	CHARGE NUMBER		INQUIRY NO	DATE OF ORDER
F. E. Landry	CE-001	G.O. 267		See Reply	11-11-70
CONFIRM NO VERBAL ORDER			NOTIFY	REQUIRED DELIVERY	QUOTED DELIVERY
See Below			F. E. Landry	As Below	As Below
BUYER	QUOTATION NO / DATE	F O B	TERMS	SHIP VIA	
D C Rhodes	See Below	Factory/Frt. Allow	See Below	Best Way	

General Electric Company
Industrial Sales
Oliver Building
Mellon Square
Pittsburgh, PA 15222
Atten: Mr. H. E. Finke

ITEM	QUANTITY	DESCRIPTION	PRICE
1	2	General Electric heavy duty MS 7000 Series combustion gas turbine generator units, each unit consisting of the equipment listed on the G. E. Quotation No. 341-73254 dated October 30, 1970, and signed by Howard E. Finke (Rev. 11-12-70)	$7,656,600.00 Lot
2	-	Technical direction of installation for the gas turbines as per quotation No. 4251-70007 dated 9-15-70 and signed by M. I. Cleveland	$38,020.00/ea
3	1	General Electric steam turbine sized for the following conditions: Inlet conditions: 1250 psig - 950°F. Automatic Extraction - 216,000 #/hr. @ 600 psig. Automatic Extraction - 483,000 #/hr. @ 260 psig. Exhaust - 217,000 #/hr. @ 120 psig. Complete with hydrogen cooled 44,000 KVA, .85 power factor, 60 cycle, 3 phase, 3,600 RPM, 13,800 Volts, 158 short circuit ratio, synchronous generator, with coolers designed for 95°F and 125 psig cooling water. To be complete with accessories and other equipment listed on G. E. Quotation # 341-73254-B (Rev.) dated November 6, 1970, and signed by Howard E. Finke. This price covers technical supervision of installation	$1,786,805.0 Lot

All prices above for both gas turbines, generators, steam turbines, etc. cover freight to accessible railsiding nearest customer's site.

Any omissions in this Purchase Order, but specified in the quotations of General Electric Company ("seller") referred to above, will apply.

84

C

PPG INDUSTRIES

CHEMICAL DIVISION
ONE GATEWAY CENTER
PITTSBURGH, PA. 15222

ORDER NO 267-001

REQUESTED BY	REQUISITION NO	CHARGE NUMBER		INQUIRY NO	DATE OF ORDER

CONFIRMING VERBAL ORDER	NOTIFY	REQUIRED DELIVERY	QUOTED DELIVERY

BUYER	QUOTATION NO./DATE	F. O. B	TERMS	SHIP VIA

ITEM	QUANTITY	DESCRIPTION	PRICE
		PPG Industries, Inc. "purchaser" reserves the right to accept or reject a five year, 40,000 hour, maintenance contract on the gas turbines beginning on the commercial operating date at a cost of $13.75 per fired hour per unit based on base load service, natural gas fuel and one start per 1000 hours or less. The $13.75 per fired hour would be subject to change each year after the first year of the contract based on escalation of labor and/or materials from the date of commercial operation. This decision on the maintenance contract does not have to be made by the purchaser until the commercial operating date. The price would cover parts or repair, technical direction, monthly inspection and labor for all normal maintenance. This does not include breakdown coverage. The purchaser has the right to purchase a spare rotor for the gas turbines within twelve months after date of purchase order, for a price of $590,000. Terms of Payment Eighty percent upon shipment from seller's factory, fifteen percent thirty days from date of shipment and five percent upon completion but not later than 180 days from date of shipment, provided that sellers shall have fulfilled all provisions of the Purchase Order as far as possible up to the time specified. Cancellation The purchaser shall have the right to terminate this Purchase Order by written notice to seller on or before May 1, 1971, if purchaser's Board of Directors have not theretofore authorized the construction by purchaser of a 1500 tons per day chlorine caustic soda plant facility at Lake Charles, Louisiana, and the requisite power generating facilities therefore, or if the plant facility thus authorized shall not require gas turbines;	

REQUESTED BY	REQUISITION NO.	CHARGE NUMBER		INQUIRY NO.	DATE OF ORDER
CONFIRMING VERBAL ORDER		NOTIFY		REQUIRED DELIVERY	QUOTED DELIVERY
BUYER	QUOTATION NO /DATE	F. O. B.	TERMS	SHIP VIA	

ITEM	QUANTITY	DESCRIPTION	PRICE
		provided, however, that if purchaser shall so terminate this Purchase Order, purchaser shall pay seller a termination charge in the amount of $21,000, upon payment of which sum all obligations of either party to the other hereunder shall terminate. The purchaser shall have the right to terminate this Purchase Order after May 1, 1971, but prior to June 1, 1971, under same terms, for an additional charge in the amount of $10,000 for steam turbine and not to exceed $150,000/Lot for two (2) gas turbines.	

Delivery

Seller will ship the gas turbines by September, 1972. The steam turbine will be shipped 18 months after final steam output quantities are decided upon. Seller will provide purchaser with production schedule promptly and on a monthly basis thereafter.

Transfer of Ownership

Purchaser reserves the right to assign or transfer this Purchase Order in its entirety to a third party, without any additional cost or penalties whatsoever to purchaser or such third party assignee as a result of such assignment; provided such third party assignee shall undertake to construct and own the power generating facilities requisite to purchaser's said chlorine-caustic soda plant facility.

Performance and Material Warranty

The seller has the obligation to make at its own expense such alterations and additions or replacements as required to meet specifications for a period of one year after start-up date.

CHEMICAL DIVISION
ONE GATEWAY CENTE
PITTSBURGH, PA. 15222

INDUSTRIES

C

ORDER NO 267-001

REQUESTED BY	REQUISITION NO.	CHARGE NUMBER		INQUIRY NO	DATE OF ORDER

CONFIRMING VERBAL ORDER	NOTIFY	REQUIRED DELIVERY	QUOTED DELIVERY

BUYER	QUOTATION NO./DATE	F. O. B	TERMS	SHIP VIA

ITEM	QUANTITY	DESCRIPTION	PRICE

Guarantee

The seller will guarantee materials or equipment and workmanship to be free of defects for a period of one year from start-up or 18 months after delivery whichever comes first. Any repairs, alterations, or replacements found to be necessary shall be made at no cost whatsoever to purchaser. Each such repair, modification, or replacement shall carry some warranty commencing on the date of the installation as the original. If the seller does not remedy and/or replace the work to comply with the foregoing requirements within a reasonable time after written notice, the purchaser may remedy and/or replace it at sellers expense.

Seller will furnish as soon as possible:

Copies	Title
7	Certified dimension prints
7	Performance curves
7	Installation, operation and maintenance instructions
7	Parts list and assembly drawings including bearings identification by Bearing Mfg. name and symbol or number, etc.
7	Recommended spare parts list with prices
7	Lubrication manuals
7	Wiring diagrams
7	Any other data necessary to install, maintain, and operate the above equipment

(One (1) reproducible of each may be furnished in lieu of copies as shown)

Confirming verbal order of November 11, 1970, to:
J. J. Broussard, H. E. Finke, Don Govdon, Jack Hull

Approved Nov. 11, 1970
L. F. Vilcox

MLA-6P-8-74

PURCHASE DEPT. FILE COP

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Ford, Bacon & Davis Construction Corporation

Acting As Agent For PPG Industries, Inc., Industrial Chemical Division

P. O. BOX 1762 – 3901 JACKSON STREET
MONROE, LOUISIANA 71201

PURCHASE ORDER

No. 1884 A 136013

ABOVE NUMBER MUST APPEAR ON ALL INVOICES, PACKAGES, SHIPPING PAPERS AND CORRESPONDENCE.

TO

Combustion Engineering Inc.
505 John Hancock Building
1055 St. Charles Avenue
New Orleans, LA 70130

REQ'N NO. C1884/3100-18

DATE October 14, 1974

THIS ORDER CONSISTS OF 3 PAGES

SHIP TO PPG INDUSTRIES, INC., INDUSTRIAL CHEMICAL DIVISION
Columbia Southern Road
Lake Charles, Louisiana 70601

SHIP VIA Your Option

F.O.B. Jobsite

TERMS: Per Contract

INVOICE INSTRUCTIONS ARE INDICATED IN ATTACHMENT "A"	Inquiry No.	Notify	Charge No.
	M-472-2	J. E. Gaines	1-3180.208

Quantity	Unit	Description	Unit Price	Total Price
		P. P. G. C-1884-D-1 The following shall be in accordance with Ford, Bacon & Davis Construction Corp. Specification M472-2 in your possession furnished with our Inquiry M-472-2 dated 8/31/73 and as technically described in C.E., Inc. Quotation No. SWS-74412 dated September 25, and October 10, 1974 and Proposal #37773. Confirms verbal placement by Mr. Fred Westrom on October 14, 1974. PURCHASE ORDER FOR COMMITMENT ONLY. CONTRACT TO GOVERN IN ALL RESPECTS.		
1	Lot	Furnish Materials, labor and equipment and perform the work for the Construction Installation and Completion of and shall Construct, Install and Complete Waste Heat System Generator and accessories complete with Safety System as per Contract Agreement dated, October 14, 1974. (Continued on page 2)	Lot	$5,177,918

136013
ps 11/10 CHB
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IMPORTANT

Bills of Lading must properly and completely describe shipment. Materials bundled shall show the total number of pieces. If this is not done, we are not responsible for carrier shortage.

Our count will be accepted as final and conclusive on all shipments not accompanied by packing slip.

Ford, Bacon & Davis Construction Corporation
Acting As Agent For PPG Industries, Inc., Industrial Chemical Divi

(Authorized Signat

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PURCHASE DEPT. FILE CO

MLA-6P-9-74

Ford, Bacon & Davis Construction Corporation
Acting As Agent For PPG Industries, Inc.,
Industrial Chemical Division

TO: Combustion Engineering, Inc.

P. O. No. 1884 A 136013
Req'n. No. C1684/3100-18
Date October 14, 1974

THIS IS TO BE CONSIDERED A PART OF THE ABOVE NUMBERED ORDER AND TO BE GOVERNED IN ALL RESPECTS BY THE TERMS AND CONDITIONS CONTAINED ON THE FIRST PAGE OF THIS ORDER.

Quantity	Unit	Description	Unit Price	Total Price
		1. All technical correspondence related to this order is to be addressed as follows: Combustion Engineering Inc. 1000 Prospect Hill Road Windsor, CT 06095 Attn: Project Manager 2. All correspondence relative to the commercial aspects of this order is to be addressed as follows: Combustion Engineering Inc. 3334 Richmond Avenue Houston, TX 77006 Attn: Southwestern Regional Sales Mgr. Escalation: See Page 2-3 of Contract Agreement. Delivery: Combustion Engineering agrees to furnish drawings and make delivery of equipment to the following dates, based upon the date of contract award being October 14, 1974. Boiler Loading Drawings Including Economizer Section — No Later than December 27, 1974 Equipment Summary Sheet — No Later than February 14, 1975 Boiler and Auxiliary Equipment Arrangement, First Issue — No Later than February 17, 1975 Control Block Diagram and Legend — No later than February 17, 1975 Proposed Platform Arrangement — No later than March 14, 1975 Console and Cabinet Drawings — No Later than April 14, 1975 Column Loads — No later than May 2, 1975		

Ford, [illegible]son & Davis Construction Co[illegible]ion
Acting As Agent For PPG Industries, Inc.,
Industrial Chemical Division

PURCHASE DEPT. FILE CC
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MLA-CP-9-74

TO: Combustion Engineering, Inc.

Page 3
P. O. No. 1884 A 136013
Req'n. No. C1384/3100-18
Date October 14, 1974

THIS IS TO BE CONSIDERED A PART OF THE ABOVE NUMBERED ORDER AND TO BE GOVERNED IN ALL RESPECTS BY THE TERMS AND CONDITIONS CONTAINED ON THE FIRST PAGE OF THIS ORDER.

Quantity	Unit	Description		Unit Price	Total Price
		Boiler and Auxiliary Equipment Arrangement - Final Issue	No Later than May 5, 1975		
		Elementary Wiring Diagrams	No Later than July 14, 1975		
		External Connection Diagrams which completes All Drawings	No Later than July 28, 1975		
		Initial Shipment - Drums, Boiler Tubes and Water Wall Panels Necessary to Begin Erection	No Later than December 12, 1975		
		Delivery to all Contract Equipment and Unit Ready for Boil-Out	No Later than November 19, 1976		
		Completion of all Erection Required Under this Contract	No Later than December 19, 1976		
		"Item 9 of Conditions of Purchase on the reverse side of this Purchase Order is deleted and is replaced by New Item 9 as shown on the enclosed Attachment "B".			

LAKE CHARLES PLANT
PPG INDUSTRIES, INC.

INSTRUCTIONS TO BIDDERS

RE: Specification K-2365
Construction of New Power Plant
At Lake Charles, Louisiana
February 16, 1971

1. DUE DATE

   Bidder shall submit his proposal as soon as possible but not later than April 2, 1971.

2. PROPOSAL

   Bidder's initial proposal shall consist of the accompanying Proposal Prices and Proposal Data Forms, properly filled out. Ten (10) extra copies of these forms are enclosed for Bidder's use.

3. PRICE INFORMATION

   The main price shall appear only where called for in the Proposal Prices and shall not appear elsewhere in the proposal. Any alternate prices shall be given on a separate price page and shall not be included with Bidder's technical or other nonprice data.

4. BID DOCUMENTS

   A. The following are attached hereto and comprise the Bid Documents:

      a. Specification K-2365, including all drawings, standards and supplements referenced therein.

      b. Exhibit A—General Terms and Conditions.

      c. Specimen Contract Agreement.

   B. Bidder shall notify PPG Industries immediately of any apparent omissions or conflicts noted in

the Bid Documents, and which affect any prices. If any conflict appears between job sepcifications and standard specifications, the job specifications shall apply.

C. Any contract or purchase order resulting from these Bid Documents will incorporate the terms and provisions of said documents. It will be assumed that Bidder agrees to the provisions of said documents, unless exceptions are specifically and clearly listed in his bid. All such exceptions must be listed together and specifically identified as *Exceptions*. Bidder's printed terms and conditions are *not* considered specific exceptions.

5. INTENT OF CONTRACT DOCUMENTS

A. The intent of the Specifications is to provide general conceptual guidance to establish operational requirements or standards. The Contractor is expected to develop, from engineering data and economic studies, the plans and specifications for, and construct a modern, efficient power plant consistent with the requirements established in the Contract Documents.

B. It is the intent that Bidder's proposal shall be based on furnishing all domestic materials. Local or Louisiana suppliers should be used where competitive. If Bidder wishes to offer any materials or equipment of foreign manufacture, he shall designate these as such and list the savings to PPG Industries in each such category.

6. EXAMINATION OF SITE

A. Contractor shall have visited the job site during Bid Period to familiarize himself with conditions under which the WORK is required to be done.

B. Contractor shall carefully examine the site of WORK and the adjacent premises, and shall conduct the necessary investigations to inform himself thoroughly as to the facilities for handling the equipment at the site and difficulties involved in the completion of all work

C. Contractor's plea of ignorance of existing or foreseeable conditions which will create difficulties or hindrances in execution of WORK is not acceptable as excuse for any failure on part of Contractor to fulfill in every detail all requirements of Specification and/or drawings. Furthermore, Contractor's plea of ignorance not acceptable as basis for any claim whatsoever for additional or extra compensation.

D. Bidders are requested to attend a prebid conference and tour of the project site. Please call Mr. F. E. Landry or Mr. W. Stagg at PPG Industries no later than March 5 at area code 318 Phone 882-1200 for further information regarding the time and meeting place.

7. ADDENDA

Addenda to the Contract Documents may be issued prior to the date of opening of the bids to clarify the documents or to reflect modifications in the design or Contract terms. Each addendum issued by PPG Industries will be distributed to each person or organization to whom a set of the Contract Documents has been issued. The recipient will acknowledge receipt of each addendum by signing and returning the receipt form distributed with the addendum. All addenda issued by PPG become a part of the Contract Documents.

8. LICENSING OF CONTRACTORS

Bidders are advised that Act 233 of 1956 of the State of Louisiana requires that all Contractors and Subcontractors on any contract amounting to $30,-

000 or more, must be licensed under said Act before performing any work thereon, and must comply with the terms and provisions of said Act. The Contract covering the work hereunder will contain a requirement to this effect and that any such licensing costs shall be borne by Contractor.

9. PROPOSAL DISTRIBUTION

Proposal must be made out in septuplicate and sent to:

PPG Industries, Inc.
One Gateway Center
Pittsburgh, Pa. 15222
Attention: Mr. D. C. Rhodes
Purchasing Manager, Central Engineering
1209 Allegheny Towers

The envelope, addressed as below, must be sealed and identified as follows:

PROPOSAL—CONFIDENTIAL
LAKE CHARLES PLANT
Specification K-2365
Construction for 1973 Power Expansion at
Lake Charles, Louisiana

10. QUESTIONS DURING BID PERIOD

All questions should be directed to Mr. F. E. Landry or Mr. W. Stagg at PPG Industries in Lake Charles, Louisiana. Area Code is 318, Phone 882-1200. Post Office Box Number is 1000.

(b) Maximum net air and gas resistance through all parts of the steam generating unit..... 16 in. H_2O for natural gas and hydrogen fuel at 675,000 lbs steam per hour.

(8) Maximum heat release in furnace (heat liberated by fuel)..... 33,000 Btu/cu ft/hr for waterwall furnaces (for natural gas fuel "A") and in accordance with ABMA limitations and good design practice

(9) Maximum carry-over in steam from boiler shall not exceed 1 ppm at maximum capacity.

(10) Steam temperature shall be uncontrolled except by desuperheater which shall limit steam temperature to 955°F. The equipment shall include a full capacity desuperheater station. Supply water for desuperheater sprays shall be taken from the boiler feed pump discharge line. Desuperheater equipment shall be arranged for easy accessibility and maintenance.

b. Fuel Analysis:

(1) The steam generating unit shall be designed to perform in accordance with the guarantee when burning gas turbine exhaust gas and natural gas, fuel "A: as listed below and 50% hydrogen as specified:

(2) Gas turbine exhaust gas analysis is as follows:

Exhaust Gas Flow
1,789,000 lb/hr at 970°F at NEMA conditions.

(3) The natural gases normally used will have analysis as listed below:
(1) Fuel A - Conoco, CSCC Meter Run.
(2) Fuel B - Texaco, Big Lake and State East Hachberry Fields, Paradise Station.

Gas Analysis, Percent Volume		Fuel A	Fuel B
Carbon Dioxide	CO_2	0.58	0.60
Nitrogen	N_2	0.27	0.38
Methane	CH_4	95.61	94.87
Ethane	C_2H_6	3.33	2.84
Propane	C_3H_8	0.17	0.83
Isobutane	$(CH_3)_3CH$	0.02	0.17
N-Butane	C_4H_{10}	0.02	0.15
Isopentane	C_5H_{12}	-	0.06
N-Pentane	C_5H_{12}	-	0.03
Hexane	C_6H_{14}	-	0.02

Gas Analysis, Percent Volume , Cont.		Fuel A	Fuel B
Heptane	C_7H_{16}	-	0.05
Total		100.00	100.00
Heat Content		1013 Btu per cu ft sat. at 15.025 psia and 60°F.	1055 Btu per cu ft sat. at 15.025 psia and 60°F.

NOTE: Normally Fuel A will be bone dry - occasionally wet. Fuel B will have a maximum of 10 pounds of moisture per million cubic feet.

**** (See Below).

C. Guaranteed Performance:

a. The following items of performance shall be guaranteed based on use of gas turbine exhaust in combination with natural gas supplement and 50% H_2 and a feedwater temperature of 228°F:

(1) Continuous superheater steam output capacity..... 675,000 lb/hr

(2) Uncorrected exit gas temperatures from the boiler..... 275°F

(3) Gas and air resistance through complete unit..... 16 in. H_2O

(4) Total pressure drop from economizer inlet to superheater outlet..... 150 psig

(5) Superheater steam temperature..... 955°F plus or minus 10°F

b. Performance data shall be based on ambient air temperature of 100°F but this temperature may vary between 20°F and 100°F.

c. Each steam generating unit when operating on natural gas and 50% H_2 fuel alone, with all burners in service, shall have a capacity of 675,000#/hr. based on a minimum of 10% excess air at the burners and the temperature of air entering the windbox of 100°F.

D. General Design and Construction:

The steam generating units shall be in accordance with the manufacturer's standard design insofar as meets the intent of these specifications and without sacrificing any performance, efficiency, and operational reliability. The following requirements take precedence over any standard design and construction not equal thereto:

a. Code Requirements: The equipment, and all piping and appurtenances furnished therewith, shall be designed, constructed, tested, and code stamped in strict accordance with the applicable requirements of the ASME Boiler and Pressure Vessel Code, Section I - Power Boilers, and shall also comply fully with other state and local codes that may govern.

Certificates: Contractor shall furnish ASME data reports of shop and/or field inspection from the Contractor's Steam Boiler Inspection and Insurance Service.

**** See Page 3-5B for expected gas turbine performance based upon using the above fuels at various temperatures and per cents relative humidity.

⚠ REVISED VERBALLY 3/5/75 BY AMPEDOCLESKY
Amp 3/5/75

(COPY ATTACHED TO RMACLANE MEMO 3/5/75 TO H. LAMOTTE)

	With Gas Turbine Exhaust & Natural Gas	Fresh Air Firing With Natural Gas
1. WASTE HEAT STEAM GENERATOR DATA, Cont.		
H. Performance Data: Cont.		
i. Gas temperature (based on above quantities):		
(1) Entering superheater..°F	2,115	2,415
(2) Leaving superheater...°F	1,415	1,835
(3) Entering economizer...°F	680	750
(4) Leaving economizer....°F	300	250
⚠ j. Percent CO_2 at boiler outlet ..(%) (Dry by Volume)	~~11.0~~ 8.35	10.6
k. Percent CO at boiler outlet....(%)	0	0
l. Natural gas fuel "A".....(Sft³/hr)	601,450	974,890
m. Efficiency steam generating unit boiler, superheater, economizer and furnace.....(%)	--	85.15
n. Gas resistance (in. water):		
(1) Furnace, boiler, superheater and economizer.....	6.75	7.05
(2) Ducts, fan and stack.....	2.50	0.50
(2a) AIR FOIL FOR GAS	0.50	—
⚠ (3) Total.....	~~9.75~~	~~7.55~~
o. Air resistance (in. water):		
(1) Ducts.....	—	.50
(2) Burner and burner box.....	6.00	6.00
(3) Total.....	6.00	6.50
p. Total gas and air resistance through ducts, burners, etc., ...(in. water)	~~15.25~~ 15.75	14.05
q. Steam pressure drop from drum to superheater outlet....(psi)	120	120

THIS CURVE TAKES INTO ACCOUNT NO L IN INL & EXHAUST SYSTEMS H

G7821 "B" Base

THIS DECREASES THESE OUTPUTS BY 1%

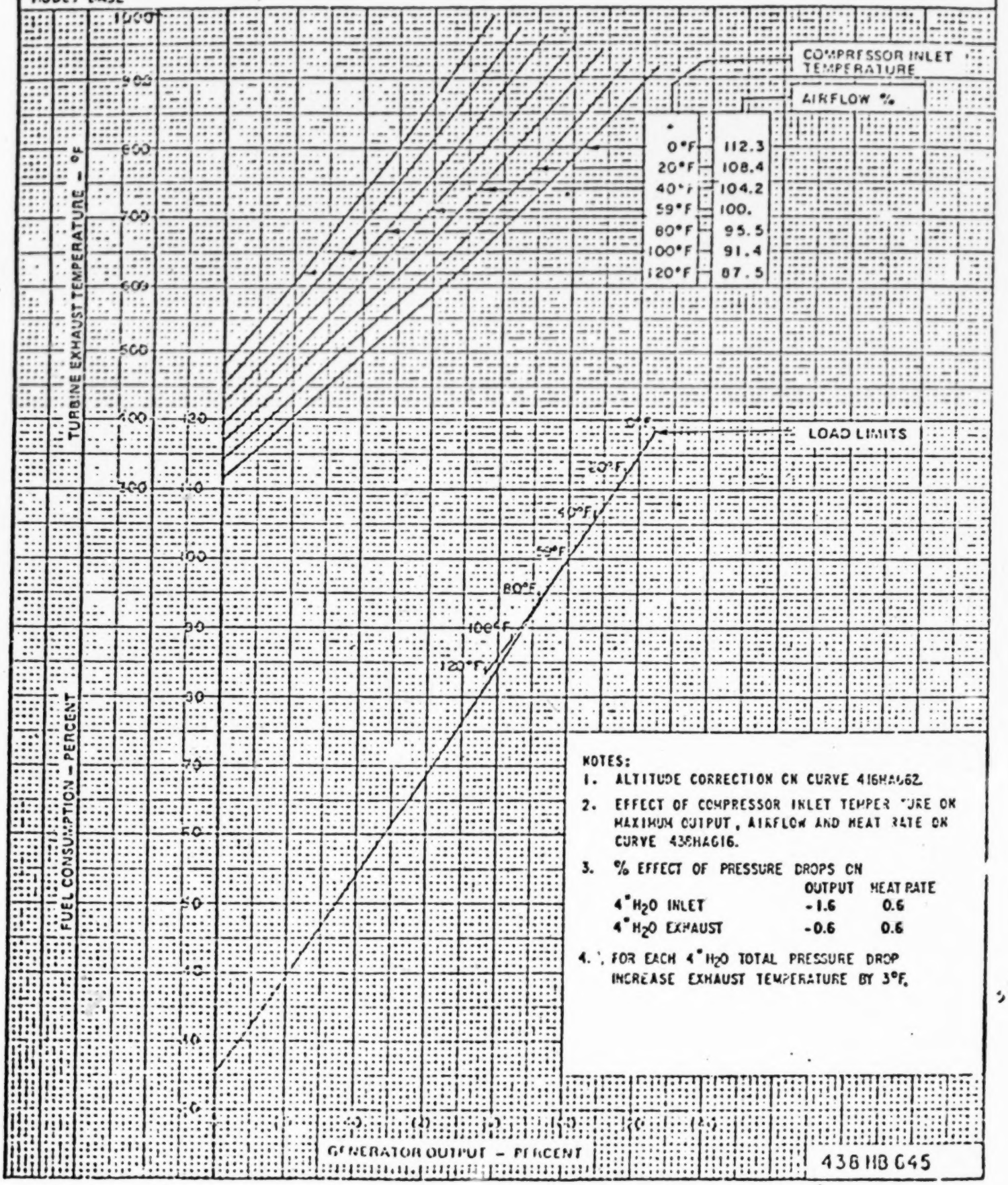
GENERAL ELECTRIC MODEL G7821; 61,300 KW GAS TURBINE
ESTIMATED PERFORMANCE

COMPRESSOR INLET TEMPERATURE 59 °F BAROMETRIC PRESSURE 14.7 PSIA

FUEL			NATURAL GAS	DISTILLATE OIL	HEAVY OILS
DESIGN OUTPUT		KW	61,300	60,000	59,800
DESIGN HEAT RATE (LHV)	1.11	BTU/KW-HR	10,830	10,960	11,000
DESIGN FUEL CONSUMPTION (LHV)		BTU/HR	663.5×10^6	657.7×10^6	657.7×10^6
DESIGN AIR FLOW	1,905,000	LBS/HR ← 59°			
DESIGN SHAFT SPEED	3,600	RPM			

BY: R.H. GRAY
DATE: 1-15-74
REV:

MODE: BASE



NOTES:

1. ALTITUDE CORRECTION ON CURVE 416HA062.
2. EFFECT OF COMPRESSOR INLET TEMPERATURE ON MAXIMUM OUTPUT, AIRFLOW AND HEAT RATE ON CURVE 436HA016.
3. % EFFECT OF PRESSURE DROPS ON

	OUTPUT	HEAT RATE
4" H_2O INLET	-1.6	0.6
4" H_2O EXHAUST	-0.6	0.6

4. FOR EACH 4" H_2O TOTAL PRESSURE DROP INCREASE EXHAUST TEMPERATURE BY 3°F.

436HB045

Oct. 5, 1976 *NSPS*

CERTIFIED MAIL—RETURN RECEIPT REQUESTED #819271

Mr. T. G. Taylor
Technical Manager
PPG Industries, Inc.
P. O. Box 1000
Lake Charles, Louisiana 70601

entered CDS 10-6-76
GOB

Dear Mr. Taylor:

Your letter and attachments of June 28, 1976 have been received and reviewed. Based on the information in that letter and your earlier submittal of May 14, 1976, we have determined that the Standards of Performance for New Stationary Sources [40 C.F.R. Part 60] apply only to the two waste heat steam generators of Powerhouse C located at the Lake Charles, Louisiana plant.

The applicability of the New Source Performance Standards (NSPS) is determined solely by the facts applicable to the specific facilities for which NSPS regulations have been issued. It is not considered relevant for NSPS purposes that the gas turbines for Powerhouse C were ordered in 1970. The purchase order you submitted on the waste heat steam generator showed that the unit was ordered on October 14, 1974. Because the contractual obligation to construct the steam generators was after the date of the proposed regulations for fossil fuel fired steam generators, August 17, 1971, the waste heat steam generators numbered 1 and 2 of Powerhouse C are subject to the provisions of the Standards of Performance for Fossil Fuel Fired Steam Generators, 40 C.F.R. Part 60, Subpart D (a copy of which is enclosed).

The two waste heat steam generators are subject to the notification and recordkeeping requirements of 40 C.F.R. 60.7 and the performance tests requirements of 40 C.F.R. 60.8 (copies of which are enclosed).

If you have any questions concerning this matter, you may contact Mr. Gary Bernath of my staff by letter or by telephone at (214) 749-7675.

Sincerely yours,

ORIGINAL SIGNED BY

O. W. Lively
Acting Director
Enforcement Division (6AE)

Enclosure a/s

cc: Mr. James Coerver
Technical Secretary
Louisiana Air Control
Commission
P. O. Box 60603
New Orleans, Louisiana 70160

bcc: DSSE, Washington, D. C.

JV
6AEL.JVeach:maX2142:9-30-76'

JC	*JF*	*GOB*	*JD*
6AEL	6AEA	6AEA	6AEA
Collins	Bernath	Fahrenthold	Doyle
10/1/76	*10/1/76*	*10/1/76*	*10/4/76*

[Italicized material appears as handwritten notations in record]

[PPG Emblem]
INDUSTRIES

0520 00004
(318) 882-1200
FTS 687-4181

PPG Industries, Inc. Industrial Chemical Division
P. O. Box 1000 Lake Charles, La. 70601

T.C. TAYLOR
Technical Manager

November 12, 1976

Mr. O. W. Lively, Acting Director
Enforcement Division
U. S. Environmental Protection Agency
First International Building
1201 Elm Street
Dallas, Texas 75270

Dear Mr. Lively:

We had hoped to discuss with you in person some of the points raised in your letter dated October 5, 1976. Since this meeting has been postponed, we respectfully request you to reconsider the matter of the two waste heat steam generators of Powerhouse C for the reasons given below. If you agree, a meeting may not be necessary.

We contend that the gas turbine purchased in 1970 is relevant with respect to the waste heat boilers. Actually, this purchase was part of a commitment, including design and engineering, to a total power/steam generation package for our new chlor-alkali production facilities.

Unlike commercial power plant installations, which produce only electric power, Powerhouse C had to be designed to satisfy the power and steam requirements of the chemical complex it would serve. A reliable source of both steam and power is essential to chlorine plants where electrolysis of brine and concentration of caustic

by evaporators are major process steps. Due to the variable requirements for both power and steam within the process units, flexibility was a key ingredient in the design of the new powerhouse. PPG selected as the most efficient method of satisfying the required power/steam balance a combined-cycle system consisting of two gas turbines exhausting into two supplementally-fired waste heat boilers, the steam from which would be used to drive one turbogenerator, which, in turn, furnishes steam for the caustic evaporators and other process steam users. (See Sargent & Lundy Dwg. M-105, dated 1-26-71, attached.)

On November 11, 1970, PPG issued the attached purchase order (267-001) to General Electric Company for the two gas turbines and turbogenerator. Item 3, the turbogenerator, would be completely useless without the steam generators (waste heat boilers) that were subsequently purchased. The turbines and boilers will operate as one unit and each was designed in conjunction with the other. The fact that the waste heat boilers were purchased separately and at a different time was dictated by the long delivery time of the turbines and generator and by the need for efficient utilization of capital.

The purchase of the gas turbines and turbogenerator in 1970 represents a commitment of $9.4 million, covering two-thirds of the equipment purchased in the combined-cycle power plant. Thus, we contend that, with the design engineering and substantiation as evidenced by the above-stated purchase order, all committed prior to August 17, 1971, for the construction of a combined-cycle plant, PPG "commenced" a continuous program of construction which excepts Powerhouse C from Part 60, New Stationary Sources Regulation.

If you have further questions, we believe that a conference in person would best expedite this serious misunderstanding. Please direct your inquiries to me. Thank you for your courtesies and prompt attention to this matter.

Sincerely,

T. G. Taylor
T. G. Taylor

edh

Attachments

cc: G. P. Cheney
J. F. Coerver

[Italicized material appears as handwritten notations in record]

[PPG Emblem]
INDUSTRIES

One Gateway Center
Pittsburgh, Pa. 15222

Order No. 267-001

Requested by	Requisition No.	Charge Number
F. E. Landry	CE-001	G.O. 267
Affirming Verbal Order	**Inquiry No.**	**Date of Order**
Below	See Reply	11-11-70
Notify	**Required Delivery**	**Quoted Delivery**
F. E. Landry	As Below	As Below
Rhodes	**Quotation No./Date**	**F O B**
	See Below	Factory/Frt. Allow
	Terms	**Ship VIA**
	See Below	Best Way

General Electric Company
Industrial Sales
Oliver Building
Mellon Square
Pittsburgh, PA 15222
Atten: Mr. H. E. Finke

Quantity	Description	Price
2	General Electric heavy duty MS 7000 Series combustion gas turbine generator units, each unit consisting of the equipment listed on the G. E. Quotation No. 341-78254 dated October 30, 1970, and signed by Howard E. Finke (Rev. 11-12-70)	$7,656,600.00/ Lot
	Technical direction of installation for the gas turbines as per quotation No. 4251-70007 dated 9-15-70 and signed by M. I. Cleveland	$38,020.00/each
	General Electric steam turbine sized for the following conditions:	
	Inlet conditions: 1250 psig—960°F. Automatic Extraction 216,000 #/hr. @ 600 psig.	

Automatic Extraction—483,000 #/hr. @ 260 psig. Exhaust—217,000 #/hr. @ 120 psig. Complete with hydrogen cooled 44,000 KVA, .85 power factor, 60 cycle, 3 phase, 3,600 RPM, 13,800 Volts, 158 short circuit ratio, synchronous generator, with coolers designed for 95°F and 125 psig cooling water. To be complete with accessories and other equipment listed on G. E. Quotation # 341-73254-B (Rev.) dated November 6, 1970, and signed by Howard E. Finke. This price covers technical supervision of installation	$1,786,805.00/ Lot

All prices above for both gas turbines, generators, steam turbines, etc. cover freight to accessible railsiding nearest customer's site.

Any omissions in this Purchase Order, but specified in the quotations of General Electric Company ("seller") referred to above, will apply.

PPG Industries, Inc. "purchaser" reserves the right to accept or reject a five year, 40,000 hour, maintenance contract on the gas turbines beginning on the commercial operating date at a cost of $13.75 per fired hour per unit based on base load service, natural gas fuel and one start per 1000 hours or less. The $13.75 per fired hour would be subject to change each year *after the first year of the contract* based on escalation of labor and/or materials from the date of commercial operation. This decision on the maintenance contract does not have to be made by the purchaser until the commercial operating date.

The price would cover parts or repair, technical direction, monthly inspection and labor for all normal maintenance. This does not include breakdown coverage.

The purchaser has the right to purchase a spare rotor for the gas turbines within twelve months after date of purchase order, for a price of $590,000.

Terms of Payment

Eighty percent upon shipment from seller's factory, fifteen percent thirty days from date of shipment and five percent upon completion but not later than 180 days from date of shipment, provided that sellers shall have fulfilled all provisions of the Purchase Order as far as possible up to the time specified.

Cancellation

The purchaser shall have the right to terminate this Purchase Order by written notice to seller on or before May 1, 1971, if purchaser's Board of Directors have not theretofore authorized the construction by purchaser of a 1500 tons per day chlorine caustic soda plant facility at Lake Charles, Louisiana, and the requisite power generating facilities therefore, or if the plant facility thus authorized shall not require gas turbines; provided, however, that if purchaser shall so terminate this Purchase Order, purchaser shall pay seller a termination charge in the amount of $21,000, upon payment of which sum all obligations of either party to the other hereunder shall terminate. The purchaser shall have the right to terminate this Purchase Order after May 1, 1971, but prior to June 1, 1971, under sam terms, for an additional charge in the amount of $10,000 for steam turbine and not to exceed $150,000/Lot for two (2) gas turbines.

Delivery

Seller will ship the gas turbines by September, 1972. The steam turbine will be shipped 18 months after final steam output quantities are decided upon. Seller will provide purchaser with production schedule promptly and on a monthly basis thereafter.

Transfer of Ownership

Purchaser reserves the right to assign or transfer this Purchase Order in its entirety to a third party, without any additional cost or penalties whatsoever to purchaser or such

third party assignee as a result of such assignment; provided such third party assignee shall undertake to construct and own the power generating facilities requisite to purchaser's said chlorine-caustic soda plant facility.

Performance and Material Warranty

The seller has the obligation to make at its own expense such alterations and additions or replacements as required to meet specifications for a period of one year after start-up date.

Guarantee

The seller will guarantee materials or equipment and workmanship to be free of defects for a period of one year from start-up or 18 months after delivery whichever comes first. Any repairs, alterations, or replacements found to be necessary shall be made at no cost whatsoever to purchaser. Each such repair, modification, or replacement shall carry same warranty commencing on the date of the installation as the original. If the seller does not remedy and/or replace the work to comply with the foregoing requirements within a reasonable time after written notice, the purchaser may remedy and/or replace it at sellers expense.

Seller will furnish as soon as possible:

Copies	*Title*
7	Certified dimension prints
7	Performance curves
7	Installation, operation and maintenence instructions
7	Parts list and assembly drawings including bearings identification by Bearing Mfg. name and symbol or number, etc.
7	Recommended spare parts list with prices
7	Lubrication manuals
7	Wiring diagrams
7	Any other data necesary to install, maintain, and operate the above equipment

(One (1) reproducible of each may be furnished in lieu of copies as shown)

Confirming verbal order of November 11, 1970, to: J. J. Broussard, H. E. Finke, Don Govdon, Jack Hull

Approved Nov. 11, 1970
L. W. Wilcox

[Italicized material appears as handwritten notation in record]

LA O S 20-04
NSPS

DEC 23 1976

Mr. T. G. Taylor
Technical Manager
PPG Industries, Inc.
P.O. Box 1000
Lake Charles, Louisiana 70601

Dear Mr. Taylor:

We have reviewed your letter of November 12, 1976 concerning the two steam generators of Powerhouse C.

As we stated in our letter of October 5, 1976, the applicability of the New Source Performance Standards (NSPS) depends solely on the facts relating to the types of equipment for which NSPS regulations have been issued. The regulations apply to a facility the construction or modification of which is commenced after the date of publication of any standard (or, if earlier, the date of publication of any proposed standard) applicable to that facility. The information you have provided shows that the commencement of the construction of the two steam generators was after the publication of the proposed regulation for fossil fuel fired steam generators. Even though you may have ordered equipment before the date of the proposed regulations that would be completely useless without the steam generators, that action is irrelevant to determine the applicability of the regulations to the two steam generators.

We hope that this discussion makes it clear why the two steam generators are subject to the provisions of the Standards of Performance for New Stationary Sources, 40 CFR Part 60.

If you still desire to have a meeting discussing this determination, please contact Mr. James Veach of my staff by letter or by telephone at (214) 749-2142.

Sincerely yours,

Original Signed By

O. W. LIVELY
Acting Director
Enforcement Division

JV12/6
6AEL:JVeach:ma:X2142:11-76:Retyped:12-6-76

JV12/6
6AEL
Collins

6AEA
Bernath

JF
Fahrenthold
6AEA
12/17/76

cc: Mr. James F. Coerver
Technical Secretary
Louisiana Air Control
Commission
P. O. Box 60630
New Orleans, Louisiana 70160

bcc:DSSE

[Italicized material appears as handwritten notation in record]

ENVIRONMENTAL PROTECTION AGENCY

VI B 1a
File Code

12-29-76

MEMORANDUM:

SUBJECT: Determination of Applicability to NSPS Subpart D.

FROM: Director, Division of Stationary Source Enforcement

TO: O.W. Lively, Acting Director
Enforcement Division (6AE)

This is in response to your memo of December 7, 1976, requesting a determination as to whether a waste heat recovery boiler used to produce steam would fall under NSPS for fossil fuel fired steam generators.

Section 60.41(a) defines a fossil fuel fired steam generating unit to be "a furnace or boiler *used in the process of burning fossil fuel* for the purpose of producing steam by heat transfer."

Since the boiler in question is not used in the process of burning fossil fuel, but rather in the process of waste heat recovery, it is our determination that the boiler in question would not be a fossil fuel fired steam generator as defined under NSPS, Subpart D.

If you have any further questions on this determination, please contact Craig Cobert (202) 755-2564 of my staff.

/s/ EER
Edward E. Reich

[Italicized material appears as handwritten material in record; concurrence and routing notations and date-received stamp omitted in printing]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

DATE: Dec. 7, 1976

SUBJECT: Request for Determination Relative to Subpart D, NSPS

FROM: O. W. Lively, Acting Director
Enforcement Division (6AE)

TO: Ed Reich, Director
Division of Stationary Source Enforcement
(EN-341)

This is to request that you render a determination of applicability to NSPS, Subpart D, for the following situation.

A power generating station is operating gas and oil fired turbines. The exhaust from the turbines is routed to a waste heat recovery boiler where it is used to produce steam. However, no combustion of either the exhaust gases or supplementary fuels occurs in the boiler. The heat input to the boiler as a result of the exhaust gases is in excess of 250 MM Btu/hr.

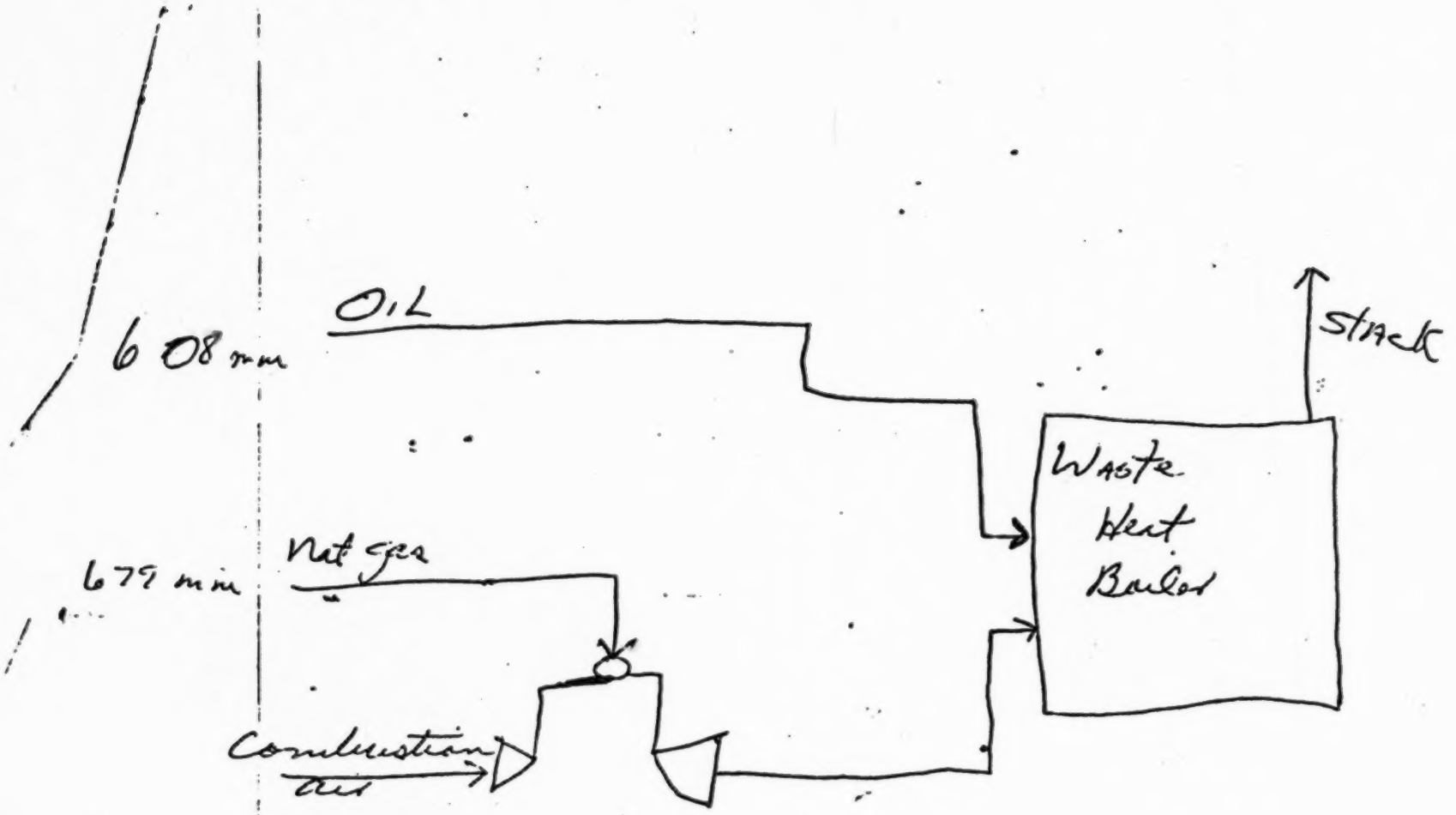
The question of applicability arises from a reading of Section 60.40 and 60.41(a). The former states that Subpart D applies to each fossil-fuel fired steam generating unit (of appropriate size). Section 60.41(a) defines a steam generating unit to mean a boiler "used in the process" of generating steam. What we have is a boiler "used in the process" of generating steam, although the combustion of the fossil fuel takes place in the turbine unit rather than the boiler.

We feel this situation to be of sufficient novelty to request your determination. Should you need additional information, you may contact Gary Bernath of my staff at (214) 749-7675.

[Handwritten notations omitted in printing]

March 10, 1977
Meeting in Dallas
EPA and PPG, Lake Charles, La.

Jim Veach, EPA, Legal Branch
Gary Bornath, EPA, Engineering Branch
R.J. Samuelson, PPG - Pittsburgh, PA.
George Cheney PPG - Pittsburgh, Asst Counsel
J.E. Wyche PPG - Lake Charles, La.



gas turbine

problem - sulfur from oil (1.0)
all comes out of stack

wants to include turbine gases
in testing to meet SO_2 standard

[PPG Emblem]

INDUSTRIES

PPG Industries, Inc./One Gateway Center
Pittsburgh, Pennsylvania 15222/Area 412/434-2145

GEORGE P. CHANEY, JR., Assistant Counsel

April 13, 1977

[Received EPA Region VI, 1977 Apr. 14 AM 9:07,
Enforcement Division]

Mr. Howard Bergman
Director, Enforcement Division
Environmental Protection Agency
Region VI
1600 Patterson Street
Dallas, Texas 75201

Re: Request for Determinations under 40 C.F.R. § 60.5.

Dear Mr. Bergman:

By this letter, PPG Industries, Incorporated, ("PPG"), seeks a determination that construction of two "waste heat" boilers, components of "Power Plant C" at PPG's Lake Charles, Louisiana works ("Lake Charles Works") was "commenced" within the meaning of Section 111 (a) (2) of the Clean Air Act, as amended, 42 U.S.C. § 1857c-6, prior to August 17, 1971, the date of proposed "new source" emission regulations for fossil-fuel fired steam generators. Alternatively, PPG seeks a determination that the regulations for fossil-fuel fired steam generators do not apply to waste heat boilers such as those being installed at the Lake Charles works. This request for determinations is submitted pursuant to 40 C.F.R. § 60.5 (captioned "Determination of construction or modification").

Power Plant C is a fully coordinated power generating system, composed of two gas-turbine generators (produc-

ing electricity) and two "waste heat" boilers (producing process steam). The first of the gas turbines will begin operation by the end of April of this year, and the companion "waste heat" boiler is projected to go on line in June. The second set of such units (turbine plus "waste heat" boiler) is scheduled for start-up in the third quarter of 1978. The determinations sought by PPG are essential to clarify tentative findings contained in a letter from Mr. O. W. Lively, Acting Director, Enforcement Division, Region VI, dated October 5, 1976, which findings have been the subject of continuing subsequent correspondence and discussion.

Should it be determined both that construction of the "waste heat" boilers of Power Plant C was not "commenced" until after August 17, 1971, and that the new source regulations for fossil-fuel fired steam generators apply to such "waste heat" boilers, PPG by this letter seeks an interpretation of the regulations as applied to the "waste heat" boilers. Because of the manner in which the standards of performance are written (explicit formulas set out allowable emissions where specified fuels are used), they cannot be readily applied to the "waste heat" boilers. The regulations would in some way have to be adapted to take into account the fact that only part of the heat used is created by the firing of fuel within the boilers themselves.

To aid in your consideration of this request, two memoranda are appended. Appendix A is a statement of the facts relevant to the determinations sought by PPG. Appendix B is a memorandum prepared by counsel based on those facts analyzing the relevant provisions of the Clean Air Act and implementing regulations.

The long and short of the matter is that the present regulations for steam generators seem to have been construed to prevent, or at least to tend to prevent, the possibility of "recapturing" waste heat, a very desirable goal from both an energy conservation and economic standpoint. On the other hand, if the turbines were operated independently of the boilers, i.e., if no attempt were made to use the waste heat from the turbine exhaust in the boilers, full compliance with the EPA standards

of performance could be achieved. This anomaly is especially troubling to PPG since the design of and course of construction for the combined turbine-"waste heat" boiler units was set in 1970, well before the advent of the standards of performance.

Very truly yours,

/s/ *George P. Cheney, Jr.*
GEORGE P. CHENEY, JR.
Assistant Counsel

cmr

Attachments

cc: Edward E. Reich
Director, Division of Stationary
Source Enforcement
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

[Italicized material appears as handwritten material in record]

APPENDIX A

MEMORANDUM OF FACTS

This memorandum sets out circumstances surrounding the design and construction of a new power plant at the Lake Charles, Louisiana works ("Lake Charles works") of PPG Industries, Inc. ("PPG"). The purpose of this new power plant, known as "Power Plant C", was and is to generate electricity and process steam for the manufacture of chlorine and caustic soda at the works.

A. Design Work

PPG became engaged in the overall design and construction of Power Plant C in 1970. The design established at that time called for the construction of two gas turbine generators (producing electricity) and two "waste heat" boilers (producing process steam). The "waste heat" boilers, as their name suggests, were designed to recapture the turbine exhaust gases from the gas turbine generators. The boilers would do so by using the heat within those exhausts, which would otherwise be wastefully dissipated into the atmosphere, for the generation of steam. The costs associated with the generation of electricity in Power Plant C were such that the project could not have been contemplated without having built into it a capacity to make fruitful use of the heat cast off by the gas turbines.

Based upon the design specifications for the "waste heat" boilers, 38.3 percent of the heat used to generate steam within the "waste heat" boilers will be supplied by the exhausts from the gas turbine generators. The remainder of the heat used by the "waste heat" boilers will be produced by the firing of fuel oil or gas within the units themselves.[1]

[1] Taking one of the boilers by itself, 598 MM BTU/hr is to be provided by the firing of oil, and 371.2 MM BTU/hr is to be provided by the "waste heat" from the exhaust from one of the turbines.

B. Contracts

The gas turbine generators were ordered in November, 1970. The specification book for the whole of Power Plant C was completed by the end of February, 1971.

Once the design of the gas turbines was determined and orders for them were placed, there were very few design options as to how the "waste heat" boilers could be built to accommodate the turbines. In fact, insofar as the quality of emissions might be affected, only three possible methods of firing the "waste heat" boilers existed: (1) front firing, (2) tangential firing, and (3) gas recirculation. The design actually chosen by PPG—tangential firing—minimizes the amount of nitrogen oxides passed by the system into the atmosphere. Thus, once the design of the gas turbines was settled and the turbines were placed on order, PPG could not have constructed "waste heat" boilers with emission characteristics more favorable than those actually constructed, while the economics of the system as a whole absolutely required that *some* form of "waste heat" boiler be built.

C. Construction Work

Some early work on the site of Power Plant C (leveling, cutting trees, general site preparation, etc.) was carried out in the summer of 1971. Further construction was not conducted immediately. In addition to the fact that the turbines had not been delivered, PPG encountered serious difficulties in securing a long-term supplier of fuel. Both matters were resolved, but the resolution of them took time.

1. The first set of turbine-boiler units.

In October of 1974, the purchase order for the first of the two "waste heat" boilers was issued to Combustion Engineering, Inc. The foundation for the first of the "waste heat" boilers of Power Plant C was poured on September 18, 1975, and the actual assembly of this boiler began on February 1, 1976. The foundation for the first of the gas turbine generators was poured beginning on

November 19, 1975; the assembly of this gas turbine began on April 8, 1976.

The first of the gas turbines was accepted from the contractor on February 23, 1977. This turbine is expected to begin operation on or about the first week of May. Acceptance of the first "waste heat" boiler is anticipated on or about May 15, 1977, and actual start-up of this boiler is expected around June 1, 1977.

2. The second set of turbine-boiler units.

The foundation for the second of the gas turbine generators ordered in 1970 was poured on February 15, 1977. It is anticipated that this second gas turbine will be in operation by mid-1978. The order for a "waste heat" boiler to be associated with this second gas turbine generator was placed on June 16, 1976, and the foundation for this second boiler was poured on December 22, 1976. Operation of this "waste heat" boiler is expected in the third quarter of 1978.

D. Projected Operating Characteristics

On the basis that 1 percent sulfur No. 6 fuel oil will be fired in the "waste heat" boilers, the amount of sulphur dioxide discharged by those boilers will be 0.67 lbs. per million BTU of heat from all sources used in the "waste heat" units themselves, and 0.50 lbs. per million BTU of heat introduced into the electricity and steam generating system of Power Plant C as a whole.

Projections for emissions of Nitrogen oxides from the combined turbine "waste heat" boiler units are uncertain. However, on the basis of the engineering work completed to date, the total amount of nitrogen oxides discharged under gas turbine inlet conditions of 75° farenheit and 60 percent relative humidity by the "waste heat" boilers should be approximately 0.39 lbs. per million BTU of heat from all sources used in the "waste heat" boilers.[2]

[2] The "waste heat" in the turbine exhausts entering the boilers should contain approximately 0.63 lbs. NOx per MM BTU. The amount of nitrogen oxides discharged by the "waste heat" boilers attributable solely to fossil fuels fired within the boilers themselves is expected to be roughly 0.24 lbs. per MM BTU derived from such fossil fuels. The NOx discharged by the "waste heat" boilers per MM BTU from all sources entering the boiler is:

$$X = \frac{(598.3)(0.24) + (371.2)(0.63)}{969.5} = 0.39$$

This is equivalent to approximately 0.29 lbs. per million BTU of heat introduced into the system of Power Plant C as a whole from all sources of energy.

Were the exhausts from the gas turbine generator allowed to pass directly into the atmosphere without being recaptured by the "waste heat" boilers, they would be expected to contain 0.335 lbs. of nitrogen oxides per MM BTU of heat derived from fossil fuel combustion within the turbine generator.

/s/ *George P. Cheney*
GEORGE P. CHENEY, JR.
Assistant Counsel
PPG Industries, Inc.
One Gateway Center
Pittsburgh, Pennsylvania
15222
(412) 434-2145

Dated: April 12, 1977

[Italicized material appears as handwritten material in record]

APPENDIX B

MEMORANDUM OF LAW

This memorandum first assays the statutory provisions and regulations applicable to a determination whether the "waste heat" boilers at the Lake Charles, Louisiana works ("Lake Charles works") of PPG Industries, Inc. ("PPG"), are new sources within the meaning of the Clean Air Act. Then it turns to a consideration of whether the "waste heat" boilers are covered or affected by the new source standards of performance for fossil-fuel fired steam generators. Finally, this memorandum assesses the difficulties of application which arise if the new source regulations are deemed to pertain to the "waste heat" boilers. The factual basis for the discussion in this memorandum is contained in the accompanying Memorandum of Facts.

Suggested determinations are set out in the conclusion of this memorandum.

I. THE "WASTE HEAT" BOILERS OF POWER PLANT C ARE NOT "NEW SOURCES" WITHIN THE MEANING OF THE CLEAN AIR ACT

A. Power Plant C As A Whole Is Clearly Not A "New Source" Within The Meaning Of The Clean Air Act And Implementing Regulations

Under Section 111(a)(2) of the Clean Air Amendments of 1970, as amended, 42 U.S.C. § 1857c-6(a)(2), the term "new source" means "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) describing a standard of performance under this section which will be applicable to such source." Under the EPA regulations, construction has "commenced" if "an owner or operator has undertaken a continuous program of construction . . . or has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction . . . ." 40 C.F.R. § 60.2(i). Proposed regulations for fossil-fuel fired steam generators were promulgated on August 17, 1971. Well before that date, PPG had undertaken a continuous program of construction respecting Power Plant C.

The planning and design for Power Plant C were begun in the 1960's. The order for the construction of the central facilities of Power Plant C, the gas turbine generators, were issued on November 11, 1970. The specification book for the whole of Power Plant C was completed by the end of February, 1971. Site preparation work was accomplished in the summer of 1971. PPG thus established the course of construction in November of 1970 and that course has been continuous down to the present and will remain so until the entire system is complete.

B. The "Waste Heat" Boilers Are Fully Integrated Parts Of Power Plant C, And The Course Of Their Construction Cannot Be Severed From That Of The Power Plant As A Whole

As a matter both of design and economics the construction of "waste heat" boilers could never have been considered, and was not considered, to be a matter separate from the construction of the gas turbine generators or of Power Plant C as a whole. The design work for the turbines reflects the design criteria for the "waste heat" boilers, and *vice versa*. The Lake Charles works needs the new power plant both to generate electricity and to manufacture process steam for the production of chlorine and caustic soda at the works. The most energy-efficient way to accomplish these twin goals is to employ a design which recaptures the very considerable heat value in the exhaust gases from the gas turbine generators. "Waste heat" boilers provide the mechanism for this recapture. From both an economic and an energy standpoint, the project would not be feasible unless the "waste heat" boilers could be employed as a complement to the gas turbine generators.

In short, once PPG was committed to building the gas turbine generators, it was not less committed to build the

"waste heat" boilers. Even though the actual order for the first "waste heat" boiler was not made to Combustion Engineering until October of 1974, PPG was bound to construct the "waste heat" boilers as of the time (November 1970) it was committed to the purchase of two gas turbine generators. The "waste heat" boilers cannot be severed from the turbine generators upon which they depend. Looking merely to the October 1974 date on a written communication between PPG and Combustion Engineering as the sole basis for determining when construction of the "waste heat" boilers was "undertaken" (the term used in the regulations) by PPG, is, in the context of this integrated facility, very misleading. The undertaking was begun much earlier. The preliminary work and initial site preparation for all the components of Power Plant C were begun at one time; there was no separate program for constructing gas turbine generators apart from "waste heat" boilers.

C The Decided Cases Do Not Warrant Treating The "Waste Heat" Boilers Of Power Plant C As "New Sources"

The purpose for distinguishing "new sources" from other sources under the Act and regulations is to avoid undue burdens on those owners or operators who have no means of adjusting their existing facilities or their inescapable obligations. Once committed to the construction of the gas turbine generator component of Power Plant C, PPG had (and now has) no choice but to press the project to its conclusion by constructing the necessary "waste heat" boilers. No design adopted by PPG could have reduced emissions below the levels associated with the current "waste heat" boilers.

Two recent judicial decisions bear on resolution of when PPG "commenced" construction of Power Plant C. In *Montana Power Company* v. *Environmental Protection Agency*, —— F. Supp. ——, 2 PCG ¶ 40,065 (D. Mont., decided January 27, 1977), the court concluded that construction of a power plant had commenced prior to the effective date of EPA's regulations for the prevention of significant deterioration, within the definition of "commence" in 40 C.F.R. § 52.21(b)(7). In the *Montana Power* case, although actual on-site construction had not begun by the effective date, the court found that EPA had failed to give due consideration to the prior irrevocable commitment of substantial funds and resources to the project and thus that construction had in fact "commenced" within the meaning of the regulations.

On the other hand, another federal court recently determined that a coal-fired generating plant actually ordered by a municipality after the promulgation of standards affecting such facilities was a "new source" within the meaning of the Clean Air Act and regulations. *United States* v. *City of Painesville*, —— F. Supp. ——, Civil Action No. 76-234 (N. D. Ohio, decided January 19, 1977). The court concluded that the City of Painesville, unlike PPG in the present situation, had entered into no binding commitment to build anything at all until after the date upon which the "new source" standards began to apply. The court further found that the City had actually changed the specifications of its coal-fired generating plant in January of 1972, well after the August 1971 effective date for the regulations.

The present circumstances are comparable to the facts in the *Montana Power* case, and differ considerably from the setting of the *Painesville* decision. PPG was fully committed to the construction of Power Plant C before the new source standards for fossil-fuel fired steam generators were proposed. Second, in the *Painesville* case the court stresses the fact that no purchase of equipment actually made by the municipality prior to the promulgation of new source standards would have been "incompatible" with a facility which complied with the new source standards. (Slip opinion, at 6.) By way of contrast, in the present situation, PPG had by August 1971 committed itself to the combined turbine"waste heat" boiler design which is at odds with the new source standards for boilers.

Especially noteworthy is the fact that preclusion of use of the waste heat in the boilers would have no favorable effects whatsoever on the environment; the exhausts from the gas turbine of Power Plant C would then pass di-

rectly into the atmosphere with their full cargo of pollutants, and process steam would have to be generated entirely by firing fossil fuel. Additional reasons for avoiding such an unwholesome result, both environmentally and economically, will be reviewed in Part II below.

II. EVEN IF IT IS CONSIDERED THAT CONSTRUCTION DID NOT COMMENCE PRIOR TO AUGUST 17, 1971, A "WASTE HEAT" BOILER IS NOT A FACILITY COVERED BY THE REGULATIONS GOVERNING "NEW SOURCES"

A. The Existing Regulations Are Not Structured To Apply To Steam Generators Fired By A Combination Of Fossil Fuels And "Waste Heat"

The only regulations that could possibly establish emissions standards for "waste heat" boilers are those governing "fossil-fired steam generators" in Part 60, Subpart D, of Title 40 of the Code of Federal Regulations. Those regulations govern facilities that produce steam by burning "fossil fuel." 40 C.F.R. § 60.41. But "waste heat" boilers are fired by a *combination* of waste heat and fossil fuel, and it is the special circumstances arising from the combination which the regulations do not address.

As promulgated, the regulations were not written to pertain to boilers relying in significant part on certain waste *fuels*. The standard for nitrogen oxides, for example, excluded from its coverage situations where new boilers were built for fuel consisting of "lignite or a solid fossil fuel containing 25 percent by weight, or more of coal refuse . . . ." 40 C.F.R. § 60.44(b). A recently proposed amendment to the regulations would, however, establish standards for emissions of nitrogen oxides from new lignite-fired steam generators. See 41 *Fed. Reg.* 55792 (December 22, 1976).

In addition, the standards were amended on November 22, 1976, to provide specific language bearing on fossil-fuel fired steam generators which also used wood residue as fuel (commonly called "hog boilers"). See 41 *Fed. Reg.* 51397-51400 (November 22, 1976).

These recent changes and proposed changes in the regulations clarify matters for those who wish to fire boilers with waste fuels. However, they do not address specifically the present situation where "waste heat" itself is sent to the boiler. The regulations simply are not structured to apply to the present situation.

B. The Existing Regulations Should Be Deemed Not To Apply To "Waste Heat" Boilers

Where regulations are not written to apply to a special set of facts, the regulations should be deemed not to apply in circumstances where the special facts are present. See *WAIT Radio* v. *Federal Communications Commission*, 135 U.S. App. D.C. 317, 321, 418 F.2d 1153, 1157 (1969). The Agency has already adopted this course of action in adopting the special regulatory provisions for hog boilers referred to above. Similarly, the existing regulations should be deemed not to apply to "waste heat" boilers.

III. IF THE REGULATIONS ARE DEEMED TO APPLY TO THE "WASTE HEAT" BOILERS AT THE LAKE CHARLES WORKS, THEY SHOULD BE ADAPTED TO TAKE INTO ACCOUNT THE FACT THAT ONLY PART OF THE HEAT USED IS CREATED BY THE FIRING OF FUEL WIHIN THE BOILERS THEMSELVES

A. The Standards For Nitrogen Oxides Cannot Be Brought To Bear On The "Waste Heat" Boiler

The standards for nitrogen oxides in 40 C.F.R. § 60.44 cannot readily be applied to the "waste heat" boilers of Power Plant C, as they make no provision for the use of the exhausts from the gas turbine generators as a source of heat in the boilers.[1] The exhausts from the gas

[1] Exhausts from gas turbine generators are at present unregulated by new source standards. Even if such standards for gas turbines should be promulgated, the gas turbine generators of Power Plant C would clearly not be "new sources" for purposes

turbine generators are not subject to emissions standards upon their discharge from the turbines themselves. In such circumstances equitable considerations suggest that passage of the turbine exhausts through the "waste heat" boilers should no less receive similar treatment, *i.e.*, be deemed to fall outside the new source standards of performance.

Conceptually, one might consider carving up the nitrogen oxides emitted from the "waste heat" boilers into two segments, one attributable to the "waste heat" component and the other to the oil-fired component. The nitrogen oxides attributable to the oil-fired component would, however, be difficult to regulate separably under the present standards because process and analytical limitations would prevent obtaining a precise and meaningful allocation between the two components of the nitrogen oxides emissions.[2]

B. The Standards For Sulfur Dioxide Require Considerable Adaptation To Test Compliance Against "Total Heat Input", As The Regulations Require

The standards for sulfur dioxide of 40 C.F.R. § 60.43 indicate that the sulfur dioxide discharged into the atmosphere shall be measured against the heat derived from various fossil fuels. If these standards are nonetheless applied to the "waste heat" boilers, some very considerable accommodations by way of interpretation must be made.

Section 60.43(c) provides specifically that "[c]ompliance shall be based on the total heat input from all fossil fuels burned, including gaseous fuels." The "waste heat" entering the boilers should be included in this "total heat input", even though the actual "waste heat" input to the

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of such regulations. PPG could thus, if it chose, allow the exhausts from the gas turbine generators to pass freely into the atmosphere. It obviously prefers not to adopt such a wasteful course of action.

[2] The same circumstances would prevent a meaningful and precise allocation of the particulate emissions.

boiler is in the form of hot gases. These gases were the product of a prior combustion.

This construction of the standards is supported by prior Agency decisions. As noted previously, recent amendments to the standards of performance for fossil-fuel fired steam generators enlarged their scope to include facilities burning wood residues in combination with fossil-fuels. The preamble to this recent amendment makes clear that fuel mixtures can play a critical role in achieving compliance with the standards:

> Complying with the standard by firing low sulfur fossil fuel requires an adequate supply of fuel with a sulfur content low enough to meet the standard. However, it would be possible for the owner or operator to fire, for example, a relatively high sulfur fossil fuel with a very low sulfur fossil fuel (*e.g.*, natural gas) to obtain a fuel mixture which would meet the standard. The low sulfur fuel adds to the heat input but not to the sulfur dioxide emissions and, thereby, has an overall fuel sulfur reduction effect.
>
> 41 *Fed. Reg.* 51397 (November 22, 1976)

CONCLUSION

Power Plant C at the Lake Charles works has been designed as an energy-efficient and economical supplier of both electricity and steam to an industrial process which needs both items. If deemed to apply, however, the new source standards for fossil-fuel fired steam generators threaten to prevent use of the critical "waste heat" component of the feed to the boiler segment of the power plant. The complementary turbine-boiler aspects of the power plant should be considered in the Agency's consideration of the request for determinations under 40 C.F.R. § 6.05.

Specifically, PPG asks

(1) that the Agency determine that PPG had embarked upon a continuous course of construction

at Power Plant C prior to August 17, 1971, such that the new source standards for fossil-fuel fired steam generators do not apply; or alternatively,

(2) that the Agency determine that the regulations for fossil-fuel fired steam generators do not apply to "waste heat" boilers such as those being installed at Power Plant C.

In the event that the Agency determines that the "waste heat" boilers at Power Plant C are subject to new source standards for fossil-fuel fired steam generators, the Agency should (1) conclude that the standards for nitrogen oxides cannot meaningfully be applied to the emissions discharged by the "waste heat" boilers, and (2) measure compliance with the standards for sulfur dioxide against the total heat input to the boiler, as required, while construing total heat input to include the "waste heat" charged to the boiler.

Respectfully submitted,

/s/ *George P. Cheney, Jr.*
GEORGE P. CHENEY, JR.
PPG Industries, Inc.
One Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 434-2145

/s/ *Charles F. Lettow*
CHARLES F. LETTOW
Joseph Isenbergh
Cleary, Gottlieb, Steen & Hamilton
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 223-2151

April 12, 1977

[Italicized material appears as handwritten material in record]

Apr. 14, 1977

NSPS Compliance Testing

Original Signed by O. W. Lively, Jr. for

Howard G. Bergman
Director
Enforcement Division (6AE)

Ed Reich
Director, Stationary Sources
Enforcement Division (EN-341)

PPG Industries, Inc. at its Lake Charles, Louisiana, plant is constructing two fossil fuel fired steam generators which are part of a combined-cycle power plant. Natural gas is burned in two gas turbines. The gases from the two turbines are fed into the two steam generators. In addition fuel oil is burned in the steam generators. The heat input from each turbine is about 679 million Btu. The fuel oil heat input to each steam generator is about 608 million Btu. The steam from the generators will be used to drive one turbo-generator which furnishes steam for the chemical complex.

PPG has requested that the compliance testing be done while the steam generators are operating on fuel oil and the turbine gases. PPG is planning to use fuel oil with a sulfur content of 1% by weight. PPG estimates that if required to conduct performance tests while burning 100% fuel oil the steam generators will exceed the sulfur dioxide standard.

It is our understanding of prior determinations that the proper performance testing in this case would be a single test while burning 100% fuel oil. However, the change to allow the use of wood residue in compliance testing implies a change in approach; therefore, we request clarification of the policy.

[Handwritten notations and routing and concurrence notations omitted in printing]

(1) Gael Bergman

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April 29, 1977

Received EPA Region VI
1977 May—2 AM 10:11
Enforcement Division

Received May 2, 1977—9 A.M.
EPA Region VI—Legal

Mr. Howard Bergman
Director, Enforcement Division
Environmental Protection Agency
Region VI
1600 Patterson Street
Dallas, Texas 75201

Mr. Edward E. Reich
Director, Division of Stationary
Source Enforcement
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Messrs. Bergman and Reich:

On April 14, 1977, Mr. George P. Cheney, Jr., Assistant Counsel, PPG Industries, Inc., filed a request for determinations under 40 C.F.R. § 60.5 (the request is dated April 13, 1977). This request pertains to "waste heat" boilers at PPG's Lake Charles works.

On April 20, 1977, in an address to a Joint Session of Congress, President Carter spoke of measures "to encourage industries and utilities to expand what is called "cogeneration' projects, which capture the steam which is now wasted from the electrical power production." (White House Press Release, at 5.) The " 'cogeneration' projects" of which President Carter spoke and what the PPG request denominates as "waste heat" boilers are the same thing. A copy of President Carter's address is attached.

Very truly yours,

/s/ *Charles F. Lettow*
CHARLES F. LETTOW

CFL/cc
Attachment
cc: George P. Cheney, Jr., Esq.
(w/attachment)

[Italicized material appears as handwritten material in record]

For Immediate Release April 20, 1977

OFFICE OF THE WHITE HOUSE
PRESS SECRETARY

THE WHITE HOUSE

REMARKS OF THE PRESIDENT TO A
JOINT SESSION OF CONGRESS

THE CAPITOL

9:05 P.M. EST

Mr. President, Mr. Speaker, Members of the Congress, and distinguished guests:

The last time we met as a group was exactly three months ago today on Inauguration Day. We have had a good beginning as partners in addressing our Nation's problems.

But in the months ahead, we must work together even more closely, to deal with the greatest domestic challenge that our Nation will face in our lifetime. We must act now—together—to devise and to implement a comprehensive national energy plan to cope with a crisis that otherwise could overwhelm us.

This cannot be an inspirational speech tonight. I don't expect much applause. It is a sober and a different presentation. During the last three months, I have come to realize very clearly why a comprehensive energy policy has not already been evolved. It has been a thankless job, but it is our job, and I believe that we have a fair, well-balanced and effective plan to present to you. It can lead to an even better life for the people of America.

The heart of our energy policy is—the heart of our energy problem is that we have too much demand for fuel that keeps going up too quickly, while production goes down, and our primary means of solving this problem is to reduce waste and inefficiency.

Oil and natural gas make up about 75 percent of our consumption in this country, but they only compromise

about 7 percent of our reserves. Our demand for oil has been rising by more than 5 percent each year, but domestic oil supplies have been dropping more than 6 percent.

Therefore, our imports have risen sharply—making us more and more vulnerable if supplies are interrupted—but early in the 1980's even foreign oil will become increasingly scarce. If it were possible for world demand to continue rising during the next few years at the rate of 5 percent a year, we could use up all the proven reserves in the entire world by the end of the next decade.

Our trade deficits are growing. We imported more than $35 billion worth of oil last year, and we will spend much more than that this year. The time has come to draw the line.

We could continue to ignore this problem—as many have done in the past—but to do so would subject our people to an impending catastrophy. That is why we need a comprehensive national energy policy. Your advice has been an important influence as this plan has taken shape. Many of its proposals will be built on the legislative initiatives that you have taken in the Congress in the last few years.

Two nights ago, I spoke to the American people about the principles behind our plan and our specific goals for 1985:

To reduce the annual growth rate in energy consumption by more than 2 percent;

To reduce gasoline consumption by 10 percent;

To cut imports of foreign oil to less than 6 million barrels a day, less than half the amount that we will be importing if we do not conserve;

To establish a strategic petroleum reserve supply of at least a billion barrels, which will meet our needs for about 10 months;

To increase our coal production by more than two-thirds, over 1 billion tons a year;

To insulate 90 percent of American homes and all new buildings; and

To use solar energy in more than 2½ million American homes.

Now, I hope that the Congress will adopt these goals by joint resolution as a demonstration of our mutual commitment to achieve them.

Tonight I want to outline the specific steps by which we can reach those goals. The proposals fall into these central categories: First, conservation; second, production; third, conversion; fourth, development; and, of course, fairness or equity, which is a primary consideration of all of our proposals.

We prefer to reach those goals through voluntary cooperation with a minimum of coercion. In many cases, we propose financial incentives, which will encourage people to save energy and will harness the power of our free economy to meet our needs.

But I must say to you that voluntary compliance will not be enough—the problem is too large and the time is too short. In a few cases, penalties and restrictions to reduce waste are essential.

Our first goal is conservation. It is the cheapest, most practical way to meet our energy needs and to reduce our growing dependence on foreign supplies of oil. With proper planning, economic growth, enhanced job opportunities and a higher quality of life can result even while we eliminate the waste of energy.

The two areas where we waste most of our energy are transportation and our heating and cooling systems. Transportation consumes 26 percent of all our energy—and as much as half of that is waste. In Europe the average automobile weighs 2,700 pounds; in our country, 4,100 pounds.

Now, the Congress has already taken fuel efficiency steps and set standards which will require new automobiles to have an average efficiency of miles per gallon of 27.5 by 1985 instead of the 18 among new cars today. The entire fleet of cars is only 14 miles per gallon at this time.

To insure that this existing congressional mandate is met, I am proposing first of all a graduated excise tax on new gas guzzlers that do not meet Federal mileage standards. This tax will start low and then rise each year until 1985. In 1978, for instance, a tax of $180

will be levied on a car getting only 15 miles per gallon, and for an 11-mile-per-gallon car the tax will be $450. That is at the beginning. By 1985 the taxes on these wasteful new cars with the same low mileage, 15 miles per gallon or 11 miles per gallon, will have risen to $1,600 and $2,500.

All of the money collected by this tax on wasteful automobiles will be returned to consumers through rebates on automobiles that are more efficient than the mileage standards. We expect both better efficiency and also more automobile production and sales under this proposal. We will insure that American automobile workers and their families do not bear an unfair share of the burden.

And of course we will also work with our foreign trading partners to see that they are treated fairly.

Now I want to discuss one of the most controversial and most misunderstood parts of the energy proposal—a standby tax on automobile gasoline. Gasoline consumption represents half of our total oil usage. We simply must save gasoline, and I believe that the American people can meet this challenge. It is a matter of patriotism and a matter of commitment.

Between now and 1980 we expect gasoline consumption to rise slightly above the present level. For the following five years, when we have the more efficient cars on the road, we need to reduce consumption each year to reach our targets for 1985.

I propose that we commit ourselves to these fair, reasonable and necessary goals and at the same time write into law a gasoline tax of an additional five cents per gallon that will automatically take effect each year that we fail to meet our annual targets in the previous year. As an added incentive, if we miss one year, but are back on the track the next year, then the additional tax should come off. Now, if the American people respond to this challenge, we can meet these targets, and under these circumstances this gasoline tax will never have to be imposed. I know and you know that it can be done.

As with other taxes, we must minimize the adverse effects on our economy—we must reward those who conserve, and penalize those who waste. Therefore, any proceeds from the tax—if it is triggered by excessive consumption—should be returned to the general public in an equitable manner.

I will also propose a variety of other measures to make our transportation system more efficient.

One of the side effects of conserving gasoline, for instance, is that state governments who have a limited amount of tax per gallon collect less money through gasoline taxes. To reduce their hardships and to insure adequate highway maintenance, we should compensate states for this loss through the Highway Trust Fund.

The second major area where we can reduce waste is in our homes and buildings. Some buildings waste half the energy used for heating and cooling. From now on we must make sure that new buildings are as efficient as possible, and that old buildings are equipped—or "retrofitted"—with insulation and heating systems that dramatically reduce the use of fuel.

The Federal Government should set an example. I will issue an Executive Order establishing strict conservation goals for both new and old Federal buildings, a 45 percent increase in efficiency for new buildings and a 20 percent increase in efficiency for old buildings by 1985.

We also need incentives, though, for those who own homes and businesses so that they will conserve. Those who weatherize buildings to make them more efficient will be eligible for a tax credit of 25 percent of the first $800 invested in conservation and 15 percent for the next $1,400.

If homeowners prefer, they may take advantage of a weatherization service which will be required from all regulated utility companies to offer. The utilities would arrange for contractors and provide reasonable financing to the homeowners. The customer would pay for the improvements through small, regular additions to the monthly utility bills. In many instances, these additional charges would be almost entirely offset by lower energy consumption brought about by energy savings.

Other proposals for conservation in homes and buildings include: First, direct Federal help for low-income residents; next, an additional 10 percent tax credit for business investments and conservation; third, Federal matching grants to non-profit schools and hospitals; and public works money for weatherizing State and local government buildings.

While improving the efficiency of our businesses and homes, we must also make electrical home appliances more efficient. I propose legislation that would for the first time impose stringent efficiency standards for household appliances by 1980.

We must also reform our utility rate structure. For many years we have rewarded waste by offering the cheapest rates to the largest users. It is difficult for individual States to make such reforms because of the intense competition in one State for new industry. The only fair way is to adopt a set of principles to be applied nationwide.

I am therefore proposing legislation which would require the following steps over the next two years:

First, phasing out promotional rates and other pricing systems that make natural gas and electricity artificially cheap for high-volume users and which do not accurately reflect actual costs;

Next, offering users peak-load pricing techniques which set higher charges during the day when demand is great and lower charges during the day when the demand is small.

We also need individual meters for each apartment in in new buildings instead of one master meter. Tests have shown that this will have 30 percent of the electrical costs in the apartment buildings.

Plans have already been discussed for the TVA—the whole system—to act as a model in implementing such new programs which I have described to conserve energy.

One final step toward conservation is to encourage industries and utilities to expand what is called "cogeneration" projects, which capture the steam which is now wasted from the electrical power production. In Germany, for instance, 29 percent of total energy comes

from cogeneration. In this country, it was formerly about 19 percent, but now it is only 4 percent in the United States.

I propose a special 10 percent tax credit for investments in cogeneration.

Along with conservation, our second major strategy is production and rational pricing. We can never increase our production of oil and natural gas by enough to meet our demand, but we must be sure that our pricing system is sensible, that it discourages waste and encourages exploration and new production.

One of the principles of our energy policy is that the price of energy should reflect its true replacement cost, as a means of bringing supply and demand into balance over the long run. Realistic pricing is especially important for our scarcest fuels, oil and natural gas. However, proposals for immediate and total decontrol of domestic oil and natural gas prices will be disastrous for our economy and also for the American families. It would not solve the long-range problems of dwindling supplies. (Applause)

The price of newly discovered oil will be allowed to rise, over a three-year period, to the 1977 world market price, with allowances from then on for inflation. The current return to producers for previously discovered oil, that which already exists, would remain the same, except for adjustments because of inflation.

Because fairness is an essential strategy of our energy policy, we do not want to give producers windfall profits, beyond the incentives that they do need for exploration and production. (Applause) But we are simply misleading ourselves, if we do not recognize the replacement costs of energy in our pricing system.

Therefore, I propose that we phase in a wellhead tax on existing supplies of domestic oil, equal to the difference between the present controlled price of oil and the world price, and return that money collected by this tax to the consumers and the workers of America.

We should also end the artificial distortions in natural gas prices in different parts of the country which have caused people in the producing States to pay exorbitant

prices, while creating shortages, unemployment, and economic stagnation, particularly in the Northeast. We must not permit energy shortages to divide or balkanize our country.

We want to work with the Congress to give gas producers an adequate incentive for exploration, working carefully toward deregulation of newly discovered gas as market conditions permit.

I propose now that the price limit of all new gas sold anywhere in this country be set at the price of the equivalent energy value of domestic crude oil, beginning late next year, 1978. This proposal will apply both to new gas and to expiring intrastate contracts. It would not affect existing contracts that are presently in effect.

We must be sure that oil and natural gas are not wasted by industries that could use coal. Our third strategy will be therefore conversion from scarce fuels to coal wherever possible.

Although coal now provides only 18 percent of our total energy needs, it makes up 90 percent of our energy reserves. Its production and use do create environmental difficulties, but I believe that we can cope with them through strict strip-mining and clean air standards.

To increase the use of coal by 400 million tons or about 65 percent—we now use about 600 million tons—in industry and utilities by 1985, I propose a sliding scale tax, starting in 1979, on large industrial users of oil and natural gas. Fertilizer manufacturers and so forth which must use gas will be exempt from the tax. Utilities would not be subject to the tax until 1983, because it will simply take them longer to convert to coal.

I will also submit proposals for expanded research and development in coal. We need to find better ways to mine it safely and to burn it cleanly, and to use it to produce other clean energy sources like liquefied and gasified coal. (Applause.) We have already spent billions of dollars on research and development on nuclear power, but very little on coal. Investments here can pay rich dividends.

Even with this conversion effort, we still face a gap—between the energy we need and the energy that we can

produce or import. Therefore, as a last resort we must continue to use increasing amounts of nuclear energy.

We now have 63 nuclear power plants, producing about three percent of our total energy, and we also have about 70 more nuclear power plants which are licensed for construction. Domestic uranium supplies can support this number of plants just by the most conservative estimate for another 75 years at least. Effective conservation efforts can minimize the shift toward nuclear power. There is no need to enter the plutonium age by licensing or building a fast breeder reactor such as the proposed demonstration plant at Clinch River. (Applause.)

We must, however, increase our capacity to produce enriched uranium fuels for light water nuclear power plants, using the new centrifuge technology, which consumes only about one-tenth the energy of existing gaseous diffusion plants.

We must also reform the nuclear licensing procedures. New plants should not be located near earthquake fault zones or near population centers, safety standards should be strengthened and enforced, designs standardized as much as possible, and we need more adequate storage for spent fuel supplies.

However, even with the most thorough safeguards, it should not take 10 years to license a plant. It only takes three years—(Applause)—it only takes three years to license, design and build a plant in a country like Japan. I propose that we establish reasonable, objective criteria for licensing and the plants which are based on the standard design not require extensive design studies before the license is granted.

Our fourth strategy is to develop permanent and reliable new energy sources. The most promising, of course, is solar energy for which most of the technology is already available. Solar water heaters and solar space heaters are ready now for commercialization. All they need is some initiative to initiate the growth of a large new market in our country.

Therefore, I am proposing a gradual decreasing tax credit, to run from now through 1984, for those who purchase approved solar heating equipment. Initially, it

would be 40 percent of the first $1,000 and 25 percent of the next $6,400 invested to provide solar heating for homes.

Increased production of geothermal energy can be insured by providing the same tax incentives as exist for gas and oil drilling operations.

Our guiding principle, as we developed this plan, was that above all it must be fair. None of our people must make an unfair sacrifice. None should reap an unfair benefit.

The desire for equity is reflected throughout our plan:

In the wellhead tax, which encourages conservation but is returned to the public;

In a dollar-for-dollar refund of the wellhead tax as it affects home heating oil, particularly in the Northeast;

In reducing the unfairness of natural gas pricing;

In insuring that homes will have the oil and natural gas they need, while industry turns toward the more abundant coal that can also suit its needs;

In basing utility prices on true cost, so every user pays a fair share;

In the automobile tax and rebate system, which rewards those who save our energy and penalize those who waste it.

I propose one other step to insure proper balance in our plan. We need more accurate information about the supplies of energy, and about the companies which produce energy.

If we are asking sacrifices of ourselves, we need facts that we can count on. We need an independent information system that will give us reliable data about energy reserves and production, emergency capabilities and financial data from the energy producers.

I happen to believe in competition, and we don't have enough of it right now. (Applause) During this time of increasing scarcity, competition among energy producers and distributors must simply be guaranteed. I recommend that individual accounting be required from energy companies for production, refining, distribution and marketing—separately for domestic and foreign operations.

Strict enforcement of the antitrust laws based on this data may prevent the need for divestiture.

Profiteering through tax shelters should be prevented, and independent drillers should have the same intangible tax credits as the major corporations. (Applause)

The energy industry should not reap large unearned profits. Increasing taxes—increasing prices on existing inventories of oil should not result in windfall gains but should be captured for the people of our country. (Applause)

Now, we must make it clear from now on to everyone that our people, through their Government, will now be setting the energy policy for our country.

The New Department of Energy which the Congress is already considering should be established without delay. Continued fragmentation of Government authority and responsibility of our energy program for this Nation is both dangerous and unnecessary.

Two nights ago, I said that this difficult effort which I have outlined would be the moral equivalent of war. If successful, this effort will protect our jobs, it will protect our environment, it will protect our national independence, it will protect our standard of living, and it will also protect our future.

Our energy policy will be innovative, but it will be fair and predictable. It will not be easy. It will demand the best of us—our vision, our dedication, our courage, and our sense of common purpose.

This is a carefully balanced program, depending for its fairness on all its major component parts. It will be a test of our basic political strength and ability.

But we have met challenges before, and our Nation has been the stronger for it after the challenge was met. That is the responsibility that we face—you in the Congress, the members of my own Administration, and all the people of our country. I am confident that together we will succeed.

Thank you very much, and goodnight.

END

(At 9:33 p.m. EST)

[SEAL]

4. 5. 6.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

May 5, 1977

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Determination of Applicability to NSPS, Subpart D

FROM: Director, (EN-341)
Division of Stationary Source Enforcement

TO: Howard G. Bergman, Director
Enforcement Division (6AE)

This is in response to your request of April 14, 1977, for a determination as to whether the contribution from turbine exhaust gases may be added to a fossil fuel-fired steam generator's combustion effluent in determining compliance with NSPS.

On April 17, 1972, the Office of Enforcement ruled, in a similar case, that:

> "The combustion turbine facility clearly is not subject to the present Federal regulations, and both the combustion effluent and thermal energy from the turbine may be discharged to the atmosphere without being limited by the standards. There would be no logic, then in penalizing an owner or operator who chooses to use the exhaust heat, which otherwise would be wasted, in a waste heat recovery steam generator unit, with or without supplemental fuel."
>
> "Accordingly, we agree that both the heat input and the emission contribution of the combustion turbine will be excluded in determining whether the steam generator plant complies with the standards. Compliance will be judged only on the amount of heat and combustion effluents added by supplemental fuel used in the waste heat recovery steam generator, which is the affected facility."

Furthermore, we did not think we could justify the inclusion of waste materials in determining compliance with NSPS simply because the Agency, when it established NSPS for fossil fuel-fired steam generators on December 23, 1971, had gathered data for *only* units which burn 100 percent fossil fuel.

On November 22, 1976, EPA amended NSPS to permit blending of wood residue and fossil fuel during the performance tests. Several companies requested this amendment to enable them to comply with the SO_2 standard by burning a combination of wood residue and high sulfur fossil fuels. However, this amendment applies only to combinations of fossil fuel and food residue and to no other combination of fossil fuel and waste material. Therefore, any steam generator, which is burning a combination of fossil fuel and gas turbine exhaust gases and is subject to NSPS, is required to conduct the performance tests, as required by section 60.8, while burning 100% fossil fuel. This is to prevent interference from the gas turbine exhaust gases which might adversely affect emissions of NO_x.

In accordance with this ruling, it will be necessary for PPG either to obtain lower sulfur fuel oil or to combine FGD with 1% fuel oil in order to comply with the SO_2 standard.

If either PPG or the Regional Office is not satisfied with the present regulation, we suggest that you express your concerns to the Emissions Standards and Engineering Division in Durham, N.C.

If you have any further questions on this determination do not hesitate to contact Craig Cobert of my staff at 755-2564.

/s/ *Ed*
EDWARD E. REICH

[Italicized material appears as handwritten material in record]

Received
EPA Region VI
1977 May 11 PM 12:12
Enforcement Division

ENVIRONMENTAL PROTECTION AGENCY

Jun 8 1977

CERTIFIED MAIL—
RETURN RECEIPT REQUESTED #560130

Mr. George P. Cheney, Jr.
Assistant Counsel
PPG Industries, Inc.
One Gateway Center
Pittsburgh, Pennsylvania 15522

Dear Mr. Cheney:

We have reviewed your letter of April 13, 1977, and the memoranda attached thereto, concerning the two "waste heat" boilers of "Power Plant C" at PPG's Lake Charles, Louisiana plant. We considered your letter as a request for reconsideration of the determination given in our letter of October 5, 1976. After consulting with the Division of Stationary Source Enforcement, we reaffirm our prior determination that the two "waste heat" boilers are subject to provisions of Standards of Performance for Fossil Fuel Fired Steam Generators, 40 CFR, Part 60, Subpart D.

As stated in our letter of December 22, 1976, to PPG, the determination of when a facility (subject to a Standard of Performance) commenced construction depends solely on the construction of that facility. Therefore, we cannot favorably consider your request that the commencement of construction of two "waste heat" boilers be tied to the construction of the entire Power Plant C.

The two boilers each have the capability of operating at more than 250 million British thermal units per hour heat input. For this reason the boilers come within the scope of the Standards of Performance for fossil fuel fired steam generating units even though the boilers can burn a combination of fuel and turbine exhaust gases.

As to the question of how to determine compliance, on April 17, 1972, the Office of Enforcement ruled, in a similar case that:

The combustion turbine facility clearly is not subject to the present Federal regulations, and both the combustion effluent and thermal energy from the turbine may be discharged to the atmosphere without being limited by the standards. There would be no logic, then in penalizing an owner or operator who chooses to use the exhaust heat, which otherwise would be wasted, in a waste heat recovery steam generator unit, with or without supplemental fuel.

Accordingly, we agree that both the heat input and the emission contribution of the combustion turbine will be excluded in determining whether the steam generator plant complies with the standards. Compliance will be judged only on the amount of heat and combustion effluents added by supplemental fuel used in the waste heat recovery steam generator, which is the affected facility.

Therefore, it is necessary for the performance tests to be conducted on 100% fossil fuel.

If you have any additional questions on this matter, please contact Mr. James Veach at (214) 749-2142.

Sincerely yours,

/s/ J. Paul Comola for
JOHN E. WHITE
Regional Administrator

bcc: Larsen, DSSE
knudson (6S&A)

[Concurrence and routing notations and handwritten notations omitted in printing]

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July 18, 1977

Mr. Edward E. Reich
Director, Division of Stationary Source Enforcement
Environmental Protection Agency
401 M Street, S. W.
Washington, D. C. 20460

Dear Mr. Reich:

By letter dated June 8, 1977, from Mr. John C. White, Region VI Administrator, to Mr. George P. Cheney, Jr. of PPG Industries, Inc., the Agency stated its decision that two waste-heat boilers being constructed at PPG's Lake Charles, Louisiana works were subject to certain provisions of the Standards of Performance for Fossil-Fuel Fired Steam Generators, 40 C.F.R. Part 60, Subpart D. Mr. White's letter emphasized that the waste-heat boilers were capable of operation with 100 percent fossil fuel without use of turbine exhaust gases, even though the boilers normally would operate with a sub-

stantial waste-heat imput from the turbine exhaust gases. The letter quotes from a prior determination made by the Agency in 1972 on another waste-heat recovery system ("D-1"), and it states that the performance tests on the boilers should be conducted with 100 percent fossil fuel. PPG will conduct the performance test in the boilers in accordance with this requirement.

In connection with this matter, as PPG's legal counsel, we have discussed the operation of the boilers with members of your staff. We also have reviewed an EPA-prepared summary of "applicability determinations" regarding the Agency's NSPS, and we have reviewed the actual text of several of these determinations. As your staff stated, these various determinations "clarify" earlier determinations and the standards themselves. Particularly because of the somewhat informal nature of the reporting system for the prior precedents (the applicability determinations), it seems desirable to set out our understanding of these determinations and of related developments within the Agency.

Mr. White's letter of June 8, 1977, states that PPG is to conduct performance tests with use of 100 percent fossil fuel and without any waste-heat input. Applicability Determination D-35 states: "The continuous monitoring requirements only apply when 100% fossil fuel is burned in any one or both boilers [which also were to use "carbon black waste off-gas imput]." Applicability Determination D-69 holds: "A waste heat recovery boiler does not fit the definition of a fossil fuel fired steam generator."

It is our understanding confirmed by members of your staff, *e.g.*, Ms. Vernet, that except for the performance test or other periods when a boiler is operating on 100 percent fossil fuel, the standards for fossil fuel fired boilers would not apply to the operation of PPG's waste-heat boilers in their planned mode which is with a significant heat imput from turbine exhaust gas. EPA's standards division (Triangle Park), we are informed, is working on development of new source standards for waste-heat boilers and of a separate set of new source standards for turbines. Under Section 111(a)(2) of the

Clean Air Act, these standards to be issued in the future would not apply to sources currently built or being constructed.

If the foregoing understandings are not correct, we ask that you so advise us promptly. PPG is making a substantial commitment to waste-heat boiler systems, and for energy and fuel supplies to those systems, and wishes to avoid any misunderstanding with reference to them.

Very truly yours,

/s/ *Charles F. Lettow*
CHARLES F. LETTOW

CFL/cc
cc: George P. Cheney, Jr., Esq.

[Italicized material appears as handwritten material in the record]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Washington, D.C. 20460

August 3, 1977

Charles F. Lettow, Esq. OFFICE OF ENFORCEMENT
Cleary, Gottlieb, Steen and Hamilton
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Dear Mr. Lettow:

Your letter of July 18, 1977, requests confirmation of your understanding of EPA's requirements regarding the applicability of new source performance standards for fossil-fuel fired boilers (40 CFR § 60.40 *et seq.*) to the operation of PPG's Lake Charles, Louisiana waste-heat boilers.

This letter is to confirm your understanding: (1) that except for the time of the performance test or other periods when a boiler is operating on 100 percent fossil fuel, the standards for fossil-fuel fired boilers would not apply to the operation of PPG's waste-heat boilers in their planned mode of operation (significant heat input from turbine exhaust gas); and (2) that any new source performance standard for waste-heat boilers which would be proposed and promulgated in the future would not apply to PPG's Lake Charles, Louisiana waste-heat boilers which commenced construction prior to the proposal date of the new standard.

If you have any questions on this matter, please contact Doug Farnsworth of my staff at (202) 755-2570.

Sincerely yours,

/s/ *Edward E. Reich*
EDWARD E. REICH, Director
Division of Stationary
Source Enforcement
(EN-341)

CONFLICT
WITH D-1

[Italicized material appears as handwritten notation in the record; some handwritten notations omitted]

MEMORANDUM TO FILES August 17, 1977

SUBJECT: NSPS Determination for PPG's Lake Charles, La., facility

FROM: Doug Farnsworth, Attorney-Advisor

I called Mr. Douglas Kliever, a partner at Cleary, Gottlieb, Steen and Hamilton, counsel for PPG, on August 8, 1977. I informed Mr. Kliever of the possibility that the determination in our August 3, 1977, letter to Mr. Lettow of his firm would be changed. I told him we would make a decision as soon as possible, but not to rely on the August 3, 1977, letter as an accurate statement of Agency policy.

I received a call from Mr. George Cheney, PPG house counsel, on August 8, 1977. He expressed his displeasure at our possible retraction of the August 3, 1977, letter. I informed him that we would make a decision as soon as possible.

I returned a phone call from Mr. Charles Lettow, counsel for PPG, on August 12, 1977, and read part of the letter we intended to mail out that day to correct our earlier letter of August 3, 1977. He requested that we delay sending the letter until after he had a chance to meet with DSSE personnel during the week of August 22, 1977. I responded that we would let him know early next week.

Rich Biondi and I spoke to Charles Lettow on August 16, 1977, and explained that PPG would not have to install monitors for SO_2 or NO_x. He indicated that because of that decision, no meeting would be necessary.

[Handwritten notations omitted in printing]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

August 18, 1977

OFFICE OF ENFORCEMENT

Mr. Charles F. Lettow
Cleary, Gottlieb, Steen and Hamilton
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Dear Mr. Lettow:

A re-examination of our August 3, 1977, letter to you concerning PPG's Lake Charles, Louisiana, waste-heat boilers reveals a misstatement of the applicable regulatory requirements affecting the PPG facility. On August 8, 1977, a member of my staff, Douglas Farnsworth, telephoned Mr. Douglas Kliever, of your firm, to notify him of the possible re-determination.

Our August 3, 1977, letter stated that your understanding was correct

> that except for the time of the performance test or other periods when a boiler is operating on 100 percent fossil fuel, the standards for fossil fuel-fired boilers would not apply to the operation of PPG's wasteheat boilers in their planned mode of operation (significant heat input from turbine exhaust gas)
> . . . .

That statement is not consistent with previous EPA determinations in similar cases, nor is it consistent with EPA Region VI's June 8, 1977, determination letter to Mr. George P. Cheney, Jr. of PPG. It is correct that during a performance test the boiler must operate at 100 percent fossil fuel. However, subsequent to the performance test, compliance will be judged on the amount of heat and emissions attributed to the fossil fuel used in the waste heat boiler. Thus, the standards of performance for a fossil fuel-fired steam generator will apply to the PPG facility at all other times after the performance test as well. However, compliance with the standard will be determined based on the heat input from the fossil

fuel and the emissions directly related to the combustion of that fossil fuel. Any heat input or emissions caused by the waste-heat will be disregarded in determining compliance.

As stated in 40 CFR § 60.11(a), compliance with standards shall be determined only by performance tests established by 40 CFR § 60.8. However, sources subject to new source performance standards are required, pursuant to 40 CFR § 60.11(d), "to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions." Since PPG has chosen low sulfur fuel as the method for meeting the standard, the regulations require burning such fuel at all times subsequent to the performance test.

As was indicated to you during your August 17, 1977, telephone conversation with Doug Farnsworth and Rich Biondi of my staff, in-stack continuous monitors for NO_x and SO_2 will not have to be installed on the PPG facility. However, an opacity monitor must be installed and operational prior to conducting performance tests (40 CFR 60.13(b)). In addition, PPG will be required to perform some form of alternative monitoring. This may include monitoring and reporting on the sulfur content of the fossil fuel burned in the boiler. PPG should contact our Region VI office in Dallas, Texas, to determine the specifics of the alternative monitoring requirements, as well as the opacity monitor.

The second point made in the August 3, 1977, letter which confirmed that PPG's Lake Charles, Louisiana, facility would not be subject to any new source performance standard for waste-heat boilers which might be proposed and promulgated in the future, is accurate in that a standard more stringent than the present one would not be applicable to the PPG facility.

I apologize for the incorrect statement made in our earlier letter. However, the position taken above is consistent with Region VI's original June 8, 1977, determination to PPG. If you have any questions on this mat-

ter, please contact Douglas Farnsworth of my staff at (202) 755-2570.

Sincerely yours,

/s/ *Edward E. Reich*
EDWARD E. REICH, Director
Division of Stationary
Source Enforcement

cc: Director, Enforcement Division
Region VI
Jack Farmer, SDB

[Italicized material appears as handwritten material in record; some handwritten notations omitted]

[PPG Emblem]

INDUSTRIES

PPG Industries, Inc./Industrial Chemical Division
P.O. Box 100/Lake Charles, La. 70601

September 6, 1977

CERTIFIED MAIL—RETURN
RECEIPT REQUESTED

Ms. Adlene Harrison, Administrator
U. S. Environmental Protection Agency
First International Building
1201 Elm Street
Dallas, TX 75270

Re: Waste Heat Steam Generator
Notification of Initial Start-up

Dear Ms. Harrison:

In compliance with paragraph 60.7(a)(3) of 40 CFR 60, Standards of Performance for New Stationary Sources, this is to advise that initial start-up of the first waste heat boiler of Powerhouse C at PPG industries, Inc., Lake Charles, Louisiana facility, was achieved on August 24, 1977.

Yours truly,

/s/ *James E. Wyche III*
JAMES E. WYCHE III
Coordinator Environmental Systems

/as

cc: J. F. Coerver
Louisiana Air Control Commission

G. P. Cheney, Jr.
PPG Industries, Inc.

[Handwritten notations and date received stamps omitted in printing]

SUPREME COURT OF THE UNITED STATES

No. 78-1918

ADLENE HARRISON, ETC., ET AL., PETITIONERS,

v.

PPG INDUSTRIES

ORDER ALLOWING CERTIORARI. Filed October 1, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 304676 116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1918

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

PPG INDUSTRIES, INC. AND CONOCO, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM IN OPPOSITION FOR RESPONDENT PPG INDUSTRIES, INC.

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July 30, 1979

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM IN OPPOSITION FOR RESPONDENT PPG INDUSTRIES, INC.

INTRODUCTION

Respondent PPG Industries, Inc. opposes the petition for writ of certiorari.

QUESTION PRESENTED

Does Section 307(b)(1) of the Clean Air Act, as amended especially by the Clean Air Act Amendments of 1977, 42 U.S.C. §7607(b)(1), confer original and exclusive jurisdiction on the courts of appeals to review final actions by the Administrator of EPA applying new source performance standards to particular facilities?

SUPPLEMENTAL STATEMENT OF THE CASE[1]

The case and the petition turn on amendments adopted in 1977 to the judicial review provisions of the Clean Air Act.

The petition for a writ of certiorari seeks review in this Court of the decision and judgment of the court of appeals dismissing a protective petition for review on jurisdictional grounds. *PPG Industries, Inc. v. Harrison*, 587 F.2d 237 (5th Cir. 1979) (Petition App. 1a). The protective petition for review related to a determination by the Environmental Protection Agency ("EPA") that the Agency's new source performance standards for air emissions from fossil-fuel fired steam generating units[2] applied to "waste heat" boilers making up part of a power plant at a chemical manufacturing works owned and operated by PPG Industries, Inc. ("PPG") at Lake

[1] Several abbreviations are used in this memorandum. "App." refers to the administrative record as reproduced in the Joint Deferred Appendix to the Briefs filed with the court of appeals. "Petition App." and "Petition Appendix" refer to the appendices to the petition for a writ of certiorari.

[2] See 40 C.F.R. §§60.1-60.15 and 60.40-60.46 (1978).

Charles, Louisiana. PPG had filed the protective petition for review in the court of appeals because of uncertainty over whether the provisions for judicial review of agency action in the Clean Air Act, as amended ("the Act"), 42 U.S.C. §§7401 *et seq.*, prescribed that initial review be had in the courts of appeals or in district courts. PPG concurrently filed a complaint in the U.S. District Court for the Western District of Louisiana alleging that EPA's determination was invalid and praying for a declaration to that effect along with an injunction against the Agency's enforcement of its determination. *PPG Industries, Inc. v. Costle*, Civ. Action No. 77-1271 (W.D. La., filed November 11, 1977).

Facts are important to this litigation. An understanding of the unexpected developments that produced this litigation is necessary to place the jurisdictional issue in context. In particular, the facts of this case demonstrate the ready applicability of the rationale of the court of appeals on the jurisdictional issue. Moreover, one of the grounds presented in this response for denial of the petition for certiorari rests upon the timing of and manner in which EPA made its determinations.

PPG was surprised when in early 1976 EPA began to consider whether new source standards should be applied to part of an integrated power plant that PPG had begun constructing in 1970. Nothing in the standards for fossil-fuel fired steam generators proposed on August 17, 1971, and later issued in due course, gave PPG notice that the standards might be applied to "waste heat" boilers, where the exhaust emissions from the boilers result in large part from the combustion of fossil fuel not in the boilers, but in associated gas turbines. And subsequently, when EPA did decide that its standards for fossil-fuel fired steam generating units

applied to the waste-heat boilers, it did not apply (and as a technological matter could not have applied) those standards as promulgated. Rather it developed requirements on an *ad hoc* basis, imposing, among other things, fuel limitations, despite the absence in the standard of any such limitations.

These are the basic factual circumstances in light of which EPA asserts its stance on jurisdiction. That stance in and of itself is startling because, during Congress's consideration of the bills which became the Clean Air Act Amendments of 1977,[3] no one involved with the legislative process gave any indication that a substantial shift of the forum for judicial review of EPA's actions from district courts to courts of appeals was even under consideration, let alone embodied in the bills.

Accordingly, this supplemental statement of the case will endeavor to provide a comprehensible description of the facility involved and also the manner in which EPA set about making its administrative determination. The following factual background for the jurisdictional issue particularly relates to two salient sets of facts and circumstances which were omitted in EPA's statement of the case and which are thus set forth in some detail.

1. PPG's power plant at the Lake Charles Works consists of a single integrated unit relying on both types of "cogeneration" technology to make highly efficient use of energy.

[3] See the discussion by the court of appeals at 587 F.2d at 243, Petition App. 12a-13a, of the revisions made to Section 307(b)(1) of the Act, as amended, 42 U.S.C. §7607(b)(1), by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (August 7, 1977).

EPA's petition recites that PPG's power plant at the Lake Charles Works uses "a coordinated system of two gas turbine generators combined with two 'waste heat' boilers." (Petition, at 4 (footnote omitted).) This characterization omits any reference to the fact that the power plant also contains a steam turbogenerator as part of the integrated unit. As the court of appeals recognized, the steam turbogenerator allows the power plant to use both the "topping cycle" method of cogeneration and a variant of the "bottoming cycle" mode:[4]

> To meet its energy requirements, PPG recently constructed a power plant designed to take advantage of fuel-efficient "cogeneration" technology. The power plant is comprised of two similar units. In each unit fossil fuel is burned in a General Electric gas turbine generator to produce electricity. Energy, or "waste heat" thrown off by the turbine's exhaust, which would normally be discharged into the atmosphere, is funnelled as a heat source into a "waste heat" boiler which also burns fuel oil. This exhaust from the turbines contributes nearly 40% (approximately 371 million British thermal units per hour) of the total input to the waste heat boiler, while the remaining heat (approximately 598 million British thermal units per hour) is provided by combustion of fuel oil or natural gas, known as fossil fuels. The highly pressurized steam produced by the waste heat boiler is first used to turn a "backpressure" turbogenerator, thereby creating more electricity, and is then channelled into PPG's main plant for use in the manufacturing process. (587 F.2d at 238-239, Petition App. 2a-3a.)

[4] As EPA's petition recognizes, the term "cogeneration" is used to denote energy-efficient production both of electricity and of process steam at one power plant. (Petition, at 4 n.1.)

This dual use has an important bearing on the factual underpinnings of EPA's decision to apply its new source standards for fossil-fuel fired steam generating units to the waste-heat boilers in the system.

Cogeneration systems are not, unfortunately, in common use in this country.[5] When they are used, reliance is ordinarily placed on only one or the other of the two modes, not both together. In layman's terms, the two cogeneration modes have been described as follows:

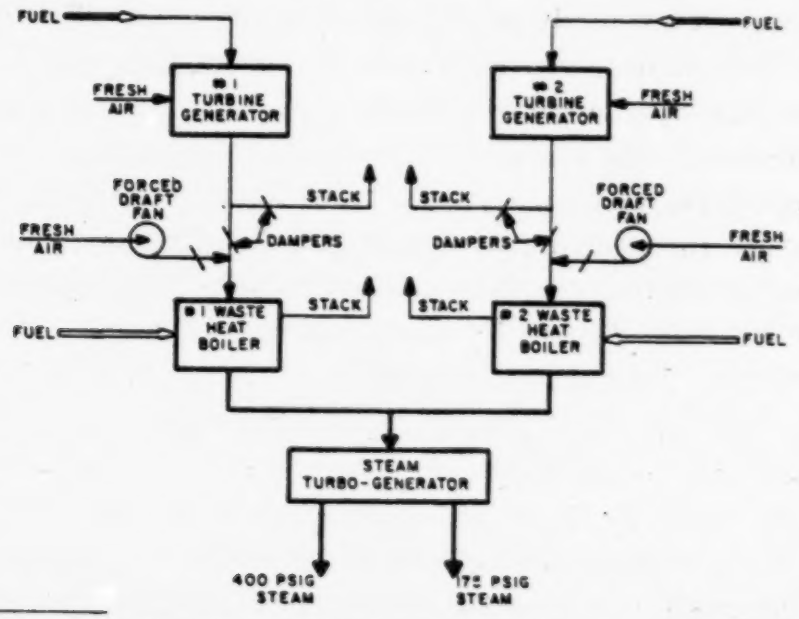
> In . . . [the 'topping-cycle'] approach to cogeneration, turbogenerators create electricity from the steam before it is used for drying and other low-temperature industrial processes. In 'bottoming cycle' operations, generators produce electricity from exhaust heat after the heat is first used for some higher-temperature processing job, such as smelting or kiln baking.
>
> (*Business Week*, June 6, 1977, at 99; Attachment A to Petitioner's Reply Brief in the court of appeals.)

Considered on a flow-chart basis (a diagram of the system is shown below) PPG s cogeneration system initially relies on a *reverse* "bottoming cycle" mode. That is, the gas turbines produce electricity from combustion of natural gas.[6] Then the waste-heat boilers use the heat in the exhaust gases from the turbines, plus heat from firing supplemental fuel, to generate high-temper-

[5] Remarks of President Carter to a Joint Session of Congress, White House Press Release, at 5 (April 20, 1977). (App. 81.)

[6] The General Electric gas turbines are also capable of using oil of certain specifications as fuel.

ature, high-pressure steam.[7] The high-temperature, high-pressure steam produced by the waste-heat boilers is supplied to the steam turbogenerator to make electricity (the "topping cycle" approach), and the resultant low-temperature, reduced-pressure steam is used in chemical processing operations at the Lake Charles Works.[8]



[7] The waste-heat boilers have been designed and constructed to use as supplemental fuel either natural gas, fuel oil, or hydrogen.

[8] The electricity produced by the system is used at the facility for, among other things, the production of chlorine and caustic from brine.

As the description of the power plant in the opinion of the court of appeals (quoted *supra*, at 5) suggests, the integrated unit is sizeable. It is rated at a total capacity of 180 megawatts of electricity and 1.35 billion BTU/hour of steam. (App. 15.) The General Electric Gas turbines are the largest model then manufactured by the company.

The savings in energy attributable to the cogeneration aspects of the system are equal to 1 million barrels of oil per year, or 42 million gallons of oil per year.

In short, the system has been carefully designed to make highly efficient use of the fuel energy supplied to it. Each component of the system serves an essential purpose. PPG first made this point to EPA when it provided EPA with information bearing on the date construction of the system would be considered to have commenced. This date has particular significance under the regulatory structure for new sources established by the Clean Air Act.

In effect, a "new source" under the definitional provisions of the Clean Air Act is a source the construction of which is commenced after the date of proposal by EPA of pertinent standards of performance. See Section 111(a)(2) of the Act, 42 U.S.C. §7411(a)(2). EPA published proposed standards for fossil-fuel fired steam generating units on August 17, 1971. See 36 *Fed. Reg.* 15,704. PPG established the design and carried out the engineering work on the system in 1970. (App. 59.). It entered into contracts for the two gas turbines and the turbogenerator in November 1970. (App. 60.) The specification book for the entire power plant was completed in February 1971.*(Id.)* PPG cleared and prepared the site for the system in 1970 and early 1971. The final purchase order for the waste-heat boilers was, however, dated October 14, 1974 (App. 34), after the effective date of the new source standards.

EPA's standards for fossil-fuel fired steam generating units do not refer to cogeneration systems in which waste-heat boilers obtain a substantial part of their heat input from the exhaust of a coordinated turbine, to take the place of heat derived from combustion of fuel. The Agency developed the standards without considering such cogeneration systems, and thus it did not address any of the technological air-emission control

problems arising in connection with the systems.[9] PPG consequently and understandably did not consider or even suspect that the new source standards applied to its facility. When in early 1976, EPA raised the issue of the applicability of the new source standards to the waste-heat boiler components of the system, PPG among other things again pointed out that no one part of the system could be considered independently from the other parts. When construction had begun in 1970 on the gas turbines and the turbogenerator, PPG had then committed itself to construct the mid-component waste-heat boilers on the basis of the integral design and engineering plan also established in 1970. This design and engineering plan was reflected in the orders for the gas turbines and steam turbogenerator in 1970, and it is reflected in the completed system. EPA refused on legal grounds to consider the fact that the waste-heat boilers by design could not practicably function except as part of the total unit. In a letter dated December 22, 1976, an official of EPA's Region VI responded that:

> [e]ven though you [PPG] may have ordered equipment before the date of the proposed regulations that would be completely useless

[9]Only now is the Agency doing so. At 44 *Fed. Reg.* 37,632 (June 28, 1979), EPA published an Advance Notice of Proposed Rulemaking stating its intent to develop proposed new source standards of performance for air pollutants from fossil-fuel fired industrial (non-utility) steam generators. To further its work on developing proposed new source standards for industrial boilers, the Agency requested comments and information on six separate issues, one of which bears specifically on cogeneration systems:

> d. Will enforcement of standards at cogeneration facilities present special problems which should be considered? (*Id.*)

without the steam generators, that action is irrelevant to determine the applicability of the regulations to the two steam generators. (App. 51.)

The "useless" equipment would have been the entire steam turbogenerator.[10]

Thereafter, on April 13, 1977, PPG filed a formal request under 40 C.F.R. §60.5[11] for a determination by EPA respecting the applicability of the new source standards to its facility.

2. EPA advised PPG that the waste-heat boilers would not be subject to the new source standards when operated as designed, but then retracted this determination and imposed on PPG fuel requirements not authorized by the standards.

EPA's Region VI responded on June 8, 1977, to PPG's request for a formal determination, after having received guidance from the Division of Stationary Source Enforcement at EPA's headquarters in Washington. The Agency determined that the waste-heat boilers were subject to the standards because they were capable of operating without waste heat input at the necessary

[10]This unit is a large 44,000 KVA-rated generator. (App. 28.) As PPG reported to EPA in 1976:

> The purchase of the gas turbines and turbogenerators in 1970 represents a commitment of $9.4 million, covering two-thirds of the equipment purchased in the combined-cycle power plant. (App. 46.)

[11]This regulation provides that an owner or operator may request such a determination, and it provides that EPA will respond within 30 days. (See Petition at 4; 587 F.2d at 241 n.3, Petition App. 8a n.3.)

level (250 million British thermal units per hour) for coverage. (Petition, Appendix F, at 31a-33a.) The Agency's response stated that the waste-heat boilers were subject to performance tests while being operated with 100 percent fossil-fuel input; it did not resolve the question of what was to happen when the boilers were operated as designed with waste heat. PPG requested a clarification. (App. 91.)

On August 3, 1977, the Director of the Division of Stationary Source Enforcement at EPA's headquarters by letter stated that the standards would apply only during a performance test or other periods when a boiler was operating entirely using fossil fuel. (Appendix A *infra*, at 1a.)

This favorable ruling was soon rescinded, however. On August 18, 1977, the Director by letter retracted the prior ruling and stated that the waste-heat boilers would be subject to *certain selected provisions* of the standards at all times. (Petition, Appendix G, at 34a-36a.) He also determined that PPG's waste-heat boilers would be required at all times to burn fuel which contained a sulfur content equal to or less than a sulfur level to be specified as a result of performance tests conducted in compliance with the standards. He stated that PPG was not required to install equipment for and to conduct the continuous monitoring for SO_2, NO_x, or CO mandated by the standards. However, PPG would be required to install and operate continuous opacity monitors in the stacks of the waste-heat boilers, and PPG may also be required to monitor and report on the sulfur content of supplemental fossil fuel burned in the boilers.

In effect, EPA had established a new *ad hoc* standard

for application to PPG's unique waste-heat boilers. Notably, the standards themselves do not prescribe fuel requirements, nor do they authorize EPA officials to establish such requirements in particular cases.

PPG sought judicial review. It was especially concerned that reliable and economic fuel sources be available for use with the cogeneration system.[12]

---

[12]PPG's concerns were not unfounded. See Tinker, *Exxon Can't Meet Low Sulfur Residual Demand*, The Oil Daily, February 23, 1979, at 1, col. 1 (blaming the problem of insufficient supplies of low sulfur fuel oil "on a shortfall of sweet, low sulfur crude oil" such as that previously obtained from Iran).

The task of obtaining suitable supplies of environmentally acceptable fuel rests with Conoco Inc., a co-respondent here and the intervenor in the case in the court of appeals. By contract amendment between Conoco and PPG, dated July 9, 1974, Conoco obligated itself to supply fuel for use in PPG's Lake Charles Works. EPA's determinations to apply the standards has resulted in the notification by PPG to Conoco that PPG claims Conoco is contractually obligated to deliver to PPG fuels having a sulfur content of seven-tenths percent (0.7%) or less. See Complaint, ¶8, in *PPG Industries, Inc. v. Costle*, Civ. Action No. 77-1271 (W.D. La., filed November 11, 1977).

During the pendency of this litigation, PPG has complied with the standards largely by using natural gas as the supplemental fuel for the waste-heat boilers. As prescribed by the standards, performance tests with natural gas were carried out on the first waste-heat boiler on August 24, 1977 (App. 97), and on the second waste-heat boiler on May 3, 1979. Letter from James E. Wyche, III to Diane Dutton, Director, Enforcement Division, EPA Region VI (June 21, 1979).(The second performance test was delayed because of a disagreement between EPA and PPG arising out of the litigation.) In each such test, the boilers met the requirements established by the standards and EPA's ruling of August 18, 1977.

REASONS FOR DENYING THE PETITION

A. If EPA's Determinations Were Made Prior To August 7, 1977, The Date Of Enactment Of The Clean Air Act Amendments Of 1977, EPA's Jurisdictional Arguments Have No Basis In Fact

Throughout this litigation, PPG has taken the position that EPA's determinations regarding the waste-heat boilers were found in three letters: the letter of June 8, 1977 from an official of EPA's Region VI office (Petition, Appendix F, at 31a), the letter of August 3, 1977 from the Director of the Division of Stationary Source Enforcement at EPA's headquarters (Appendix A *infra*, at 1a), and the letter of August 18, 1977 also from the Director (Petition, Appendix G, at 34a.). For example, the fuel restrictions first appear (they are not set out in the standards) in the letter of August 18, 1977.

The Clean Air Act Amendments were enacted on August 7, 1977. See Pub. L. No. 95-95, 91 Stat. 685 (August 7, 1977). These 1977 Amendments revised Section 307(b)(1) of the Clean Air Act, 42 U.S.C. §7607(b)(1), to add the statutory language upon which EPA relies for its jurisdictional arguments. Prior to the 1977 Amendments, it was beyond dispute that a final action by EPA such as the one in the present case was subject to review in an action brought in a United States District Court under 28 U.S.C. §1331 (the federal question statute) and 5 U.S.C. §§701-706 (the Administrative Procedure Act). See *Utah Power & Light Co. v. Environmental Protection Agency*, 180 U.S. App. D.C. 70, 553 F.2d 215 (1977).

In its petition, EPA avers that its determinations were made in the letter dated June 8, 1977 from an official of the Agency's Region VI office. (See Petition, at 4.) The letter of August 18, 1977, from a Division Director at EPA's Washington headquarters is characterized as a "clarifi[cation]." (*Id.* at 5.) Perhaps understandably, the petition disregards the substantively contrary letter dated August 3, 1977 from the Division Director.

If the characterizations in the petition for the Agency are proper, then EPA's determinations were in fact made prior to enactment of the 1977 Amendments. In these circumstances, the revisions made by the 1977 Amendments to the judicial review provisions arguably would not apply in this case even if EPA's arguments on jurisdiction were correct and the decision of the court of appeals were wrong.

B. No Conflict Exists Among The Relevant Decisions Of The Courts Of Appeals; The Courts Have Harmonized Their Jurisdictional Rulings On Amended Section 307(b)(1) To Provide A Framework For A Reasoned, Practical Construction Of These New Portions Of The Clean Air Act

In the petition, EPA avers that approximately 90 currently pending actions depend on the jurisdictional question decided by the court of appeals in this case. (Petition, at 13 n.8.) EPA claims that "serious problems" with the administration of the Clean Air Act are created because of the decision by the court of

appeals. (*Id.* at 13.)[13] Thus far at least, the courts of appeals have not had so much difficulty as EPA claims. Indeed, the three decisions by courts of appeals reported to date bearing on the jurisdictional issue are in harmony with each other and provide a workable starting point for a reasoned, practical construction of the recently amended judicial-review portions of the Clean Air Act.

Under the judicial-review provision of the Clean Air Act, Section 307(b)(1), as amended, 42 U.S.C. §7607(b)(1), a court of appeals has exclusive jurisdiction to review any order issued by the Administrator of EPA under several specifically enumerated sections, or "any other final action of the

[13]No trouble even arguably arose under the Act as it stood prior to the 1977 Amendments. Then, under *Utah Power & Light Co. v. Environmental Protection Agency*, 180 U.S. App. D.C. 70, 553 F.2d 215 (1977), the district courts clearly had jurisdiction to review action by EPA applying regulations to particular facilities. See *supra*, at 13. EPA, however, argues that the 1977 Amendments changed the jurisdictional import of the judicial review provisions in the Act. It is thus EPA's jurisdictional argument, not the position of PPG or Conoco, which creates any difficulty.

In fact, EPA has ensured that regulated parties will be presented with a difficult jurisdictional decision regarding the forum for review. In notices recently published by EPA in the *Federal Register* reporting that the Agency had granted or denied a permit to construct a particular new facility, EPA has included an explicit statement that review of its action to grant or deny the requested permit must be had in the appropriate court of appeals. See, *e.g.*, 44 *Fed. Reg.* 41,531 (July 17, 1979) (giving notice that EPA had granted a "PSD" permit to FlexCon Company for construction of a new "pressure-sensitive adhesive coater with a gas-fired incinerator").

Administrator" under the Act which is locally or regionally applicable. Because the action in this case involved the interpretation and application of a regulation, it did not fall within any of the specifically enumerated sections of the statute.[14] Therefore, in order for the court of appeals to have jurisdiction, EPA's action had to come within the "any other final action" clause of the statute.

The court of appeals attempted to determine what type of action was within the "any other final action" language of the statute by reference to the legislative history of the 1977 Amendments. However, the legislative history spoke only of *venue* for review, not jurisdiction. See 587 F.2d at 243 n.6, Petition App. 15a-16a n.6. As the court of appeals observed, the legislative history "complete[ly] fail[s] to mention what EPA asserts was a massive shift in jurisdiction to the courts of appeals." *Id.* at 243, Petition App. 15a.

[14]Notably also, the action was not taken by the Administrator of EPA which the statutory provisions require as a predicate for review actions to be brought jurisdictionally in the courts of appeals. EPA's actions were taken by an official of EPA's Region VI office and by the Director of the Division of Stationary Source Enforcement at EPA's headquarters.

EPA's regulations (40 C.F.R. §60.5) provide that determinations regarding applicability of new source standards are to be made by the Administrator. This is so even though the regulations also specify that "[a]ll . . . applications, submittals, and other communications to the Administrator pursuant to this part shall be . . . addressed to the appropriate Regional Office of the Environmental Protection Agency, to the attention of the Director, Enforcement Division [of the Region]." (40 C.F.R. §60.4.)

Section 301(a)(1) of the Clean Air Act, as amended, 42 U.S.C. §7601(a)(1), permits the Administrator to delegate his "powers and duties" other than rulemaking authority.

The court accordingly turned to other aids to statutory construction. It concluded that the amended statutory provisions must be read in light of the limitations in the ability of a court of appeals to develop facts. In the court's view the determination regarding jurisdiction should reflect the capability provided a district court to call into play discovery procedures to prove out a more comprehensible administrative record.

As previously noted, EPA's interpretation and application of its regulation in the present case produced a record that consisted of a collection of correspondence between the Agency and the petitioner. The court of appeals found that this record was "sparse" and might leave the reviewing court in a position where it would be unable to verify, or even identify, the EPA's grounds for its decision. 587 F.2d at 244–245, Petition App. 19a. Because the appellate courts lack the fact finding mechanisms available to district courts, they are ill-suited to conduct a meaningful review of administrative action resting on records that are either sparse or non-existent.[15] Therefore, the

[15]The court of appeals also feared that courts of appeals would not be able to provide prompt review, and suggested that delayed review would be costly and prejudicial to the parties:

> At this level [the court of appeals], only after hearing, which may be long delayed because of other calendar commitments, can it be known whether the record is sufficient for review purposes. An insufficient record may necessitate a removal for fact-finding and record completion and a second court appearance, often before other judges, long delayed. 587 F.2d at 245; Petition App. 20a.

Moreover, as the court of appeals had stated in a prior decision, "[r]emand to the agency for a statement of reasons for its decision would risk after the fact rationalization, which the evidence gathering powers of a trial court can more easily penetrate." *Save the Bay, Inc. v. Administrator of Environmental Protection Agency*, 556 F.2d 1282, 1292 (5th Cir. 1977).

court of appeals held that the "any other final action" clause in the statute would not include any final action taken on such an informal basis that it produced an administrative record insufficient for a court of appeals to review. Such informal actions should be reviewed at the district court level to permit the record to be proven by way of discovery and other means. *Id.*, Petition App. 20a-21a.

Other courts of appeals have accepted this ruling. In *United States Steel Corp. v. Environmental Protection Agency*, 595 F.2d 207 (5th Cir. 1979), the petitioners filed for review of EPA's action in promulgating regulations designating areas in Alabama as nonattainment areas for suspended particulates. The court found that it had jurisdiction under 42 U.S.C. §7607(b)(1) to review the agency action. *Id.* at 212. It distinguished this decision from its prior decision in the *PPG* case on the basis of the type of agency action taken and the resulting administrative records involved in each case. The court noted that the record in the *PPG* case consisted solely of exchanges of correspondence.

Since there was a substantial record in the *U.S. Steel* case, derived from a rulemaking proceeding, the court found that the considerations that gave rise to the result in the *PPG* case were absent. The court explicitly acknowledged the difference in the nature of the two actions. In the *PPG* case EPA had determined that a certain regulation was applicable to a specific plant, while in the *U.S. Steel* case EPA had promulgated regulations having a general effect in the specified areas.

Similarly, in *Sharon Steel Corp. v. Environmental Protection Agency*, 597 F.2d 377 (3d Cir. 1979), steel-company petitioners sought review of a final rule issued by EPA embodying the determination that four

areas of Pennsylvania were nonattainment areas for suspended particulates.

The court briefly discussed the jurisdictional issue, and in doing so, distinguished the case before it from the Fifth Circuit's prior decision in the *PPG* case on grounds similar to those set out in the Fifth Circuit's *U.S. Steel* decision. See 597 F.2d at 379 n.3. The court took the position that the *PPG* case was not applicable in the case before it because EPA had in its case taken rulemaking action under 5 U.S.C. §553. The court opined that the *PPG* case stood for the proposition that 42 U.S.C. §7607 did not give jurisdiction to courts of appeals to review the interpretation and application of regulations, where the Agency was acting on an informal basis. *Id.*

Consequently, in the three cases reported to date interpreting the "other final action clause" of Section 307(b)(1), the courts have reached decisions which are not in conflict and which provide a reasoned and practical conceptual basis for deciding which of the many types of "other actions" are properly to be reviewed in courts of appeals and which are to be reviewed in district courts. If an action taken by EPA was based upon the record provided by a formal adjudicatory proceeding or by a rulemaking proceeding, then the action must be reviewed in the courts of appeals. If the action reflects informal adjudicatory proceedings, then district courts must undertake the task of review. This is precisely the result advocated as a general matter by two distinguished commentators. See Currie and Goodman, *Judicial Review Of Federal Administrative Action: Quest For The Optimum Forum*, 75 Colum. L. Rev. 1, 54-61 (1975).

EPA's petition offers several reasons for reaching a result contrary to that of the court of appeals. Among other things, it asserts that this is a case of "undisputed facts." (Petition, at 8.) This assertion is not correct. The facts regarding the cogeneration system were not fully developed in the exchanges of correspondence, in large part because EPA rejected the legal relevance of much information. For example, EPA did not concern itself with the integrated design of the cogeneration system or with the orders for and construction of the gas turbines and the steam turbogenerator. The Agency explicitly took the position it would not consider these matters even if equipment such as the steam turbogenerator would be "useless" in the absence of the waste-heat boilers. See *supra,* at 9-10.

Yet the Agency recognized the special characteristics of the cogeneration system in rewriting on an *ad hoc* basis the new source standards. It imposed fuel requirements not found in the standards and otherwise selectively chose among the requirements of the standards, as evidenced by the letter of August 18, 1977. No basis or rationale for these *ad hoc* determinations appears in the 97 pages of correspondence making up the administrative record certified to the court of appeals by the Agency in this case.

Document discovery and interrogatories would force disclosure by the Agency of whether it indeed had any basis for its *ad hoc* action, and if it had such a basis, whether the basis was sustainable on the record.

EPA's petition focuses particularly on discovery procedures. (See Petition, at 11-12.) Contrary to EPA's claims, the court of appeals did not direct or invite the district court "to go far beyond the administrative

record and to create a judicial record much broader than the administrative proceedings." (*Id.* at 11 (footnote omitted).) The discovery proceedings which have taken place in the district court since the decision by the court of appeals have been clearly and sharply addressed to proving out the full administrative record before the Agency at the time the determinations were made. That is, the discovery has sought disclosure of materials and information before EPA at that time, along with the bases upon which those who made the decisions acted. It is on these grounds that the district court on May 22, 1979, denied EPA's Motion for A Protective Order barring all further discovery. The district court on June 6, 1979, directed EPA to answer certain interrogatories previously served on the Agency by intervenor Conoco, Inc. EPA has since responded to those interrogatories. This course of events is consistent with this Court's opinions in *Camp v. Pitts,* 411 U.S. 138, 143 (1973), and *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420 (1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 30, 1979

APPENDIX A

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Washington, D.C. 20450

August 3, 1977
Office of Enforcement

Charles F. Lettow, Esq.
Cleary, Gottlieb, Steen and Hamilton
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Dear Mr. Lettow:

Your letter of July 18, 1977, requests confirmation of your understanding of EPA's requirements regarding the applicability of new source performance standards for fossil-fuel fired boilers (40 CFR §60.40 *et. seq.*) to the operation of PPG's Lake Charles, Louisiana waste-heat boilers.

This letter is to confirm your understanding: (1) that except for the time of the performance test or other periods when a boiler is operating on 100 percent fossil fuel, the standards for fossil-fuel fired boilers would not apply to the operation of PPG's waste-heat boilers in their planned mode of operation (significant heat input from turbine exhaust gas); and (2) that any new source performance standard for waste-heat boilers which would be proposed and promulgated in the future would not apply to PPG s Lake Charles, Louisiana

waste-heat boilers which commenced construction prior to the proposal date of the new standard.

If you have any questions on this matter, please contact Doug Farnsworth of my staff at (202) 755-2570.

Sincerely yours,

/s/ Edward E. Reich,
Edward E. Reich, Director
Division of Stationary Source
Enforcement (EN-341)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1918

ADLENE HARRISON, REGIONAL ADMINISTRATOR AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY,
Petitioners,

versus

PPG INDUSTRIES, INC., and CONOCO, INC.,
Respondents.

OPPOSITION OF RESPONDENT CONOCO, INC. TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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OPPOSITION OF RESPONDENT CONOCO, INC. TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, Conoco, Inc., who appeared as Intervenor below, herein opposes the petition for certiorari filed on June 29, 1979, on behalf of Petitioners Adlene Harrison and Douglas M. Costle.

QUESTION PRESENTED

Whether Section 307(b)(1) of the Clean Air Act, 42 U.S.C. §7607(b)(1), confers original and exclusive jurisdiction on the courts of appeals to review final actions by the Administrator of the U.S. Environmental Protection Agency applying new source performance standards to particular facilities.

STATEMENT OF THE CASE

Respondent Conoco, Inc., concurs in the Supplemental Statement of the Case set forth in the Memorandum in Opposition filed by Respondent PPG Industries, Inc.

REASONS FOR DENYING THE PETITION

1. There Is No Conflict Among the Relevant Decisions of the Courts of Appeals.

Petitioner has asserted that there are some 90 actions now pending which depend on the meaning of the "any other final action" clause of Section 307(b)(1) to determine proper jurisdiction. (Petition at 13 n.8.) Petitioner then states that the decision of the Fifth Circuit in *PPG Industries, Inc. v. Harrison*[1] creates serious problems in administering the Clean Air Act. However, an examination of the decisions dealing with this jurisdictional issue shows that the courts of appeals have had no difficulty in arriving at nonconflicting results.

1 587 F.2d 237 (5th Cir. 1979).

Only the Fifth and Third Circuits have considered whether the addition of the "any other final action" language by the 1977 Amendments to the Clean Air Act requires that all final agency action be subject to initial review in the courts of appeals. In *PPG Industries, Inc. v. Harrison,* the Fifth Circuit reviewed the legislative history of the 1977 Amendments in an attempt to discern what type of action was included within that phrase. Because the legislative history addressed only venue and did not mention a major shift of jurisdiction to the courts of appeals, the court sought other guides to the construction of the phrase. The court concluded that Congress drafted Section 307(b)(1) with the limitations on the ability of the courts of appeals to develop facts in mind.[2] Thus, the court held that an EPA action that was so informal that it gave rise to a record unsuited to court of appeals review was not included within the "any other final action" phrase in Section 307(b)(1).[3]

In *United States Steel Corp. v. EPA,* 595 F.2d 207 (5th Cir. 1979), the Fifth Circuit was again faced with a challenge to its jurisdiction to review agency action under Section 307(b)(1). Finding that it had jurisdiction, the court distinguished its earlier decision in *PPG Industries, Inc. v. Harrison.* Because the *U.S. Steel* case involved a sub-

2 587 F.2d at 245.

3 587 F.2d at 245.

stantial record growing out of a *rulemaking* proceeding, the factors which led to the decision in *PPG Industries* were not present. In *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3rd Cir. 1979), the Third Circuit treated the same jurisdictional question briefly. Like the Fifth Circuit in *U.S. Steel*, the court found that *PPG Industries* did not apply because in the case before it EPA had taken rulemaking action pursuant to 5 U.S.C. §553.

Thus, the three reported decisions that have considered the "any other final action" clause of Section 307(b)(1) do not conflict. In the absence of any conflict among the courts of appeals, there is as yet no need for Supreme Court review.

Finally, the issue raised by the decision in *PPG Industries* is potentially complex. The Fifth Circuit, for example, has characterized EPA's interpretation of Section 307(b)(1) as indicating "a massive shift of jurisdiction to the courts of appeals."[4] In this situation, it is well to recall the Supreme Court's recognition of "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977). The considerations expressed by the Supreme Court in this regard are equally applicable to the case at bar.

4 587 F.2d at 243.

2. The Decision Below is Narrowly Drawn and Therefore of Limited Applicability.

By its terms, the decision applies only to those situations in which the agency action was so informal that it produced an administrative record clearly insufficient to provide an adequate basis for judicial review in the courts of appeals. As the court of appeals observed, the administrative record in the instant case is comprised of nothing more than a collection of correspondence between the agency and respondent PPG Industries, Inc.[5] A perusal of this correspondence reveals a near total lack of articulable bases for the agency's determination that the waste-heat boilers in question are new sources subject to new source performance standards under the Clean Air Act. The Administrator's "reasons" for subjecting these facilities to these regulations are not reasons at all, but mere conclusions. It is only in this and similar situations — where the administrative record is so patently incomplete as to afford no meaningful basis for judicial appraisal of the agency's decision-making process — that initial review of agency action is inappropriate at the appellate level.

3. The Decision of the Court of Appeals is Correct.

a. Where the administrative record is clearly insufficient to permit meaningful review of agency ac-

5 587 F.2d at 244.

tion, the court of appeals may refuse to exercise its jurisdiction under Section 307(b)(1). In such a case, review is more properly had in the district court so as to permit fact and record development prior to court confrontation. In reviewing agency action under the Clean Air Act, courts are instructed to enquire whether that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Clean Air Act §307(d)(9)(A), 42 U.S.C. §7607(d)(9)(A). That determination cannot be made where the administrative record consists of only the sparsest of documentation. See *Texas v. EPA*, 499 F.2d 289, 321-22 (5th Cir. 1974) (Clark, J., concurring), *cert. denied*, 427 U.S. 905 (1976). Although remand to the agency for a statement of reasons for its decision is one alternative, that solution "would risk after the fact rationalization, which the evidence gathering power of a trial court can more easily penetrate." *Save the Bay, Inc. v. Administrator*, 556 F.2d 1282, 1292 (5th Cir. 1977). See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420-21 (1971). In such a case, the district court becomes the only available forum for meaningful review of agency action.

b. Initial review in the district courts of agency action unsupported by a complete administrative record will not burden the administration of the Clean Air Act. District court review of agency action will only be required in a limited number of cases. Out of the approximately 90 actions now pending against EPA which depend on the meaning of "any other final action" to determine proper jurisdiction, only two, other

than the present case, have involved simultaneous filings in both the district court and the court of appeals. (Petition at 13 n.8.) Where simultaneous filing does occur, it will be a relatively simple matter for the court of appeals to determine on the face of the administrative record that the agency action in question is or is not sufficiently supported so as to warrant initial appellate review. Thus, contrary to Petitioner's assertion that jurisdiction to review EPA action will be left "entirely to chance," that decision will be committed to the sound discretion of the courts of appeals.

Finally, it is the agency's responsibility to ensure that its decisions are supported by an adequate administrative record. The law requires that administrative agencies "articulate the factors on which they base their decisions," *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971), and "explicate fully [their] course of inquiry, . . . analysis and . . . reasoning," *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971). Where the agency has failed to fulfill its proper function in this respect, it cannot be heard to complain of the "burdensome discovery" which may take place in the district courts. The practical effect of the decision below, therefore, is to compel the Administrator to fully and clearly set forth the reasons for his decisions in every instance. This, in turn, will mean that fewer cases need be subject to initial review in the district courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The Supreme Court of the United States

OCTOBER TERM, 1979

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

PPG INDUSTRIES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1918

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

PPG INDUSTRIES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 587 F.2d 237. The final decision of the Administrator (A. 97-98, 104-106) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on January 8, 1979. A timely petition for rehearing was denied on February 26, 1979. On May 23, 1979, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including June 26, 1979. The petition was filed on June

25, 1979, and was granted on October 1, 1979 (A.108). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals has original jurisdiction under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. I) 7607(b)(1), to review a final action by the Administrator applying new-source performance standards to certain power generating facilities.

STATUTE AND REGULATIONS INVOLVED

1. Section 307(b) of the Clean Air Act, as amended by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 776, and by Pub. L. No. 95-190, 91 Stat. 1404, 42 U.S.C. (Supp. I) 7607(b), provides:

> (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112, any standard of performance or requirement under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, any standard under section 231, any rule issued under section 113, 119, or under section 120, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), any order under section 111(j), under section 112(c), under section 113(d), under section 119, or under section 120, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date

> of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

2. Pertinent passages of the following provisions are reproduced in the Appendix, *infra*:

(a) 40 C.F.R. 60.5; and

(b) 40 C.F.R. 60.40 through 60.43.

STATEMENT

1. Section 111 of the Clean Air Act requires the Administrator of EPA to publish a list of categories of stationary sources which cause or contribute significantly

to air pollution. 42 U.S.C. (Supp. I) 7411(b)(1)(A). The Administrator is then directed to promulgate regulations establishing standards of performance for new sources within the list of categories. 42 U.S.C. (Supp. I) 7411(b)(1)(B). The Act defines "new source" as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." 42 U.S.C. (Supp. I) 7411(a)(2).

On March 31, 1971, the Administrator published an initial list of stationary sources, which included "fossil fuel-fired steam generators." 36 Fed. Reg. 5931. Proposed regulations for this category were published on August 17, 1971 (36 Fed. Reg. 15704), and became effective on December 23, 1971 (36 Fed. Reg. 24876). These regulations set emission limits for three pollutants including sulfur dioxide. See 40 C.F.R. 60.1–60.15 and 60.40–60.46.

The regulations define a "fossil-fuel-fired steam generating unit" as "a furnace or boiler used in the process of burning fossil fuel for the purpose of producing steam by heat transfer." 40 C.F.R. 60.41(a). Regulated facilities are units having a heat-input rate of at least 250 million BTU per hour. 40 C.F.R. 60.40(a). For such furnaces or boilers, the regulations establish separate standards for particulate matter, 40 C.F.R. 60.42, for sulfur dioxide, 40 C.F.R. 60.43, and for nitrogen oxides, 40 C.F.R. 60.44. The regulations apply only to stationary sources for which construction or a modification was commenced after the proposal of the applicable standard (August 17, 1971). 40 C.F.R. 60.40(c). The regulations specifically provide that upon request by an owner or operator of a facility the Administrator will determine whether action taken or planned constitutes or will constitute construction,

modification or the commencement of construction or modification. 40 C.F.R. 60.5.[1]

2. Respondent, PPG Industries, Inc., a chemical manufacturing corporation, constructed a power facility at its plant in Lake Charles, Louisiana (A. 8). The power facility was designed to utilize a coordinated system of two gas turbine generators, combined with two so-called "waste-heat" boilers (A. 65–66, 68). Each generator-boiler unit operates the same way. The gas turbine generator burns fossil fuel to create hot gases that turn the turbine to produce electricity. The "waste heat" exhausted from this process is funnelled into a waste-heat boiler to aid in the combustion of additional fossil fuel. This process produces high-temperature, high-pressure steam which turns a turbogenerator to create more electricity. This electricity and the low-pressure, spent steam are then used in PPG's chemical manufacturing process (A. 18–19, 51–52, 68).

In February 1975, Conoco Oil Company, PPG's fuel supplier, advised EPA that Conoco was switching from supplying natural gas to supplying fossil fuel (fuel oil) for PPG's fossil-fuel-fired steam generators in Lake Charles (A. 8). Because such a switch might have been a "modification" of the facility within the terms of 40 C.F.R. 60.14, EPA requested more information from PPG (A. 8–9, 11, 25–26). In May and June 1976, PPG submitted information concerning the boilers used at its plant and stated that the new power facility utilizing waste heat boilers had been designed and ordered in 1970, prior to the applicable date of the New-Source Performance Standard (NSPS) regulations (A. 12–24, 27–48). EPA nevertheless concluded that the waste-heat steam generators were subject to the provisions of the NSPS regulations (A. 49–50, 59–60). In December

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[1] The terms "construction," "modification," and "commenced" are specifically defined by the regulations. 40 C.F.R. 60.2(g), (h), (i).

1976, EPA advised PPG that because the construction of the two steam generators had commenced after the publication of the proposed regulations for fossil-fuel-fired steam generators, the fact that some of the equipment was ordered before this date was irrelevant (A. 59).

In April 1977, PPG submitted a formal request to EPA for a determination under 40 C.F.R. 60.5 that construction of the two waste-heat boilers commenced prior to the effective date of the regulations (so that the boilers were not "new source[s]"), or, in the alternative, for a determination that the NSPS regulations were inapplicable altogether to waste-heat boilers (A. 65–80, 82–94). PPG's submission included a memorandum of facts (A. 68–71) and a memorandum of law (A. 72–80). By letter of June 8, 1977, however, EPA advised PPG that the two waste-heat boilers were new sources subject to the regulations (A. 97–98).[2]

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[2] EPA's letter of June 8, 1977, stated that performance tests would be conducted while the boilers were using 100% fuel oil. This prompted a request for clarification by the company on July 18, 1977 (A. 99–101). PPG expressed its understanding that the emissions standards for fossil-fuel-fired boilers would apply only during the performance tests and other times when the system was operating with 100% fossil fuel. However, since the planned mode of operation for the boilers depended on partial use of fossil fuel together with the turbine exhaust gas as a heat source, the emissions standards would not apply during the routine operation of the system.

A letter from EPA's Division of Stationary Source Enforcement on August 3, 1977, confirmed this interpretation (A. 102). That interpretation was contrary to EPA's previous determination in the June 8, 1977, letter and in similar cases (A. 104). On August 8, 1977, an EPA representative telephoned an official of PPG to notify it that the August 3d letter was incorrect (A. 103). This advice was then confirmed by EPA in its letter of August 18, 1977, in which EPA reaffirmed that the new-source performance standards applied to the waste-heat boilers and required PPG to install opacity monitors and to perform alternative monitoring tests (A. 104–106).

3. On October 4, 1977, PPG filed a petition in the court of appeals for judicial review of EPA's determination that the standards applied to the waste-heat boilers (A. 2–3). The following month, PPG also filed a complaint against the Administrator in the United States District Court for the Western District of Louisiana, seeking an injunction invalidating the agency's action. *PPG Industries* v. *Costle*, No. 77–1271 (W.D. La.).[3] PPG then challenged the jurisdiction of the court of appeals, contending that its original jurisdiction extended only to review of those actions of the Administrator specifically enumerated in Section 307(b)(1) (see pages 2–3, *supra*). EPA argued that the jurisdiction of the court of appeals was not limited to review of the actions specifically enumerated in Section 307(b)(1) but expressly included review of "any other final action" of the agency and included the determination in this case.

The court of appeals held that "any other final action" in Section 307(b)(1) did not include EPA's determination that the PPG facility was subject to the NSPS regulations, for three reasons.[4] First, the court noted (Pet. App. 11a) that prior to the 1977 amendment of Section 307(b), "the district courts and not the courts of appeals had jurisdiction [under 28 U.S.C. 1331] to review determinations of [such] local applications * * *."[5] Although the 1977 amendment added the phrase "any other final action" to the statutory list of items to be reviewed by the courts of appeals, the court thought

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[3] Continental Oil Company, intervenors in the petition for review, joined PPG as plaintiffs in the district court action. The jurisdiction of the district court was purportedly invoked under 28 U.S.C. 1331, 1332, and 1337.

[4] The court of appeals did not reach the merits of whether PPG's waste-heat boilers were new sources within the terms of the regulations. The district court action involving that issue has been informally stayed pending decision in this case.

[5] The preamendment language of Section 307(b)(1), 42 U.S.C. 1857h–5(b)(1), is set forth at note 6, *infra*.

that it was "most revealing" that the legislative history of this amendment made no reference to any "massive shift of jurisdiction to the courts of appeals" (Pet. App. 15a). This silence suggested to the court that Congress did not really mean to shift review of numerous local determinations by EPA to the court of appeals. Second, pointing out that the administrative record here consists mostly of correspondence, the court stated that an administrative determination based on a skeletal record should be reviewed by the district court in the first instance so that "[t]he discovery apparatus of district courts" could permit "fact and record development" (*id.* at 17a, 20a). Congress, the court of appeals surmised, must have inserted "any other final action" into Section 307(b)(1) with the "mechanical limitations of the courts of appeals in mind" (*id.* at 21a). Finally, the court noted that Section 307(b)(1) specifically enumerates certain determinations for review in the court of appeals before adding the phrase "and any other final action." This enumeration, the court thought, would be redundant if "any other final action" literally comprehended *any* final action (*id.* at 15a). Therefore, Section 307(b)(1)'s "any other final action" did not include a determination under 40 C.F.R. 60.5 that a specific facility is a new-source subject to NSPS regulations (*id.* at 20a–21a).

SUMMARY OF ARGUMENT

In the 1977 amendment to Section 307(b)(1), Congress expanded the jurisdiction of the courts of appeals to include review of all "final action[s]" of EPA under the Clean Air Act. The problem presented by this case is whether EPA's determination that PPG's boilers are subject to the new-source regulations is a "final action."

Three considerations support our conclusion that it is. First, EPA's action represents the agency's final determination, short of an enforcement action, of the issue whether the new-source regulations apply to PPG's

facility. That the determination is declaratory in form does not alter its status as a final action. Nor does it matter that the determination is the product of fact and law submissions to the agency and the agency's follow-up inquiries rather than the product of an evidentiary hearing. Such administrative declarations have been regarded as "final agency action" for the analogous purpose of review under the Administrative Procedure Act, 5 U.S.C. 704. They also should be regarded as "final" for the administrative review provisions of the Clean Air Act. That Congress so used the phrase in the Clean Air Act is demonstrated by the specific enumeration in Section 307(b)(1) of certain reviewable agency actions that are determined in very much the same way as the determination in this case.

Second, the legislative history shows that the addition of the "final action" clauses was intended to permit review of "essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court of appeals for the circuit in which such locality, State or region is located." H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 323 (1977). The legislative history at no point calls for review in the district courts. All references are to review of final actions in the courts of appeals.

Third, the purposes of preenforcement review would be better served by construing Section 307(b)(1) to include EPA determinations of the type in question. One purpose of preenforcement review is to resolve promptly the legal obligations of regulated persons before they are required to act at their peril. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148–156 (1967). Had the court of appeals resolved the legal issue posed in this case, that purpose would have been served, and PPG would have obtained a final appellate determination of its rights and obligations without risking civil or criminal liability. Another purpose of preenforcement

review is to establish promptly the validity or invalidity of EPA's regulatory program and its component decisions. Had the Fifth Circuit reviewed EPA's interpretation of the statute and its regulations in this case, EPA would have obtained a prompt and final appellate approval or rejection of its interpretation, at least within the territory of the Fifth Circuit. See generally *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284 (1978). Significantly, if preenforcement review is unavailable under Section 307(b)(1) because the action is not a "final action," then preenforcement review is also unavailable under the Administrative Procedure Act, which permits review only of a "final agency action." 5 U.S.C. 704. Because the basic point of Section 307(b)(1) is to provide preenforcement review, Congress could hardly have intended any result which would completely frustrate the purposes of preenforcement review.

The court of appeals felt that preenforcement review of agency action based on a "skeletal record" would be better served by routing such cases through the district courts where discovery and additional fact finding could be used to augment the administrative record. Aside from the fact that inserting an additional layer of judicial review would frustrate prompt preenforcement review, it is well established that where an administrative record is too skeletal, the proper course is a remand to the agency for preparation of a more complete record, not judicially supervised discovery and fact finding. *Camp* v. *Pitts*, 411 U.S. 138, 141-143 (1973).

ARGUMENT

Prior to the Clean Air Act Amendments of 1977, Section 307(b)(1) provided that certain specifically enumerated actions of nationwide consequences were reviewable only in the District of Columbia Circuit and that certain local actions were reviewable only in the appropriate regional circuits.[6] The 1977 amendment added to the list of actions reviewable exclusively in the District of Columbia Circuit "any other nationally applicable regulations promulgated, *or final action* taken" under the Act (emphasis added). In parallel fashion, the amendment added to the list of EPA actions reviewable only in the appropriate regional court of appeals "*any*

[6] Prior to the 1977 amendment Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1), provided:

> A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under Section 112, any standard of performance under Section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.

The 1977 amendments to Section 307(b)(1), enacted on August 7, 1977, were in effect when PPG filed its complaint, but had not yet been enacted at the time EPA made its final decision regarding the PPG facility. The jurisdictional amendments changed only the applicable procedures for review, and not substantive law or rights already vested. As such, the amended Section 307(b)(1) applied to all subsequent review actions, regardless of the date of the pertinent agency decision. See *Denver & R.G.W.R.R.* v. *Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967); *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916).

other final action of the Administrator" under the Clean Air Act "which is locally or regionally applicable" (emphasis added). Congress, therefore, clearly meant to confine review of all "final action[s]," in the courts of appeals.

The plain meaning of "final action," the legislative history of Section 307(b), and its purpose all support our conclusion that EPA's determination in this case (that PPG's boilers are subject to its new-source regulations) is a "final action" within the meaning of Section 307(b)(1).

I. The Plain Meaning Of "Final Action" Includes EPA's Determination In This Case

The Clean Air Act does not define the term "final action," but the phrase has a traditional meaning. "[A]gency action" is defined by the Administrative Procedure Act to include "the whole or a part of an agency rule, order * * * or the equivalent * * * thereof * * * ." 5 U.S.C. 551(13).

An "order" means "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or *declaratory* in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. 551(6) (emphasis added).[7] Such a declaratory "order" may be issued to "terminate a controversy or remove uncertainty." 5 U.S.C. 554(e); see *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 625–628 (1973); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70–71 (1970); *Red*

[7] *ITT* v. *Local 134, IBEW*, 419 U.S. 428 (1975), held that an NLRB determination under Section 10(k) of the National Labor Relations Act is not an "order" under 5 U.S.C. 551(6) and therefore such a proceeding is not an "adjudication" subject to 5 U.S.C. 554. However, a Section 10(k) determination merely assesses whether there is "reasonable cause" to believe the striking union is entitled to the disputed work. See 419 U.S. at 444–446 & n.16. In the present case, in contrast, EPA's determination is not tentative and is its final disposition of the issue presented by PPG.

A "rule" means "the whole or part of an agency statement of general or particular applicability and future effect designed to * * * interpret * * * law or policy * * * ." 5 U.S.C. 551(4). Even if the ruling in the present case were not an "order," it is an agency statement of particular applicability designed to interpret the agency's regulations, *i.e.*, an interpretive ruling. It is thus an "agency action." See generally K. Davis, *Administrative Law Treatise* §7:3 (2d ed. 1979).

[8] Section 307(b)(1) refers to final action of the Administrator. The June 8, 1977, letter to PPG was signed by the Regional Administrator (A.97–98). "Administrator" is defined for purposes of the NSPS regulations as the Administrator "or his authorized representative." 40 C.F.R. 60.2(b). All requests for determinations on the applicability of the regulations are directed to the appropriate regional office of EPA. 40 C.F.R. 60.4. A final decision by the regional officer is, therefore, a "final action of the Administrator" within the statute.

Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 372–373 n.3 (1969); *First Savings & Loan Ass'n of the Bahamas, Ltd.* v. *SEC*, 358 F.2d 358, 360 (5th Cir. 1966); *Phillips* v. *SEC*, 388 F.2d 964 (2d Cir. 1968); see generally, Comment, *Declaratory Orders—Uncertain Tools to Remove Uncertainty?* 20 Ad. L. Rev. 257 (1968); Note, *Administrative Declaratory Orders*, 13 Stan. L. Rev. 307 (1961).

The ruling in the present case is the agency's final disposition declaring the applicability of its new-source regulations to PPG's boiler operations. Short of an enforcement action, the agency has rendered its last word on the matter.[8] PPG applied for a formal determination under 40 C.F.R. 60.5 concerning whether its facility is subject to the regulations. After consideration of PPG's submissions, including a law memorandum, EPA determined that the facility is subject to the regulations. PPG's disagreement with that determination turns only on an interpretation of the new-source regulations and their application to facts submitted by PPG. No further

administrative appeals remain and, unless PPG honors EPA's ruling, it will be enforced through enforcement proceedings under Section 113, 42 U.S.C. (Supp. I) 7413. Such an order, even though made without an evidentiary hearing, is "final agency action."[9] *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 372-373 n.3; *National Automatic Laundry and Cleaning Council* v. *Shultz*, 443 F.2d 689, 691-692, 698-699 (D.C. Cir. 1971); *Medical Committee for Human Rights* v. *SEC*, 432 F.2d 659 (D.C. Cir. 1970), vacated on other grounds, 404 U.S. 403 (1972). See generally K. Davis, *Administrative Law Treatise* §4.10 (1970 Supp.); Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185, 196-205 (1974); Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv. L. Rev. 980, 989-992 (1975).[10]

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[9] The formal adjudicatory hearing provisions of 5 U.S.C. 554 do not apply to EPA's order inasmuch as Section 554 applies only to adjudications required by statute to be made "on the record." *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972); *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 238-246 (1973); *ITT* v. *Local 134, IBEW*, 419 U.S. 428, 438-441 (1975).

[10] Nor is finality defeated because the action is interpretive. In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149-152 (1967), the court of appeals held that the rulings at issue were merely interpretive of the statute. See *Abbott Laboratories* v. *Celebrezze*, 352 F.2d 286, 288-289 (3d Cir. 1965). Without disagreeing with that characterization, this Court held the rulings were "final agency action" under 5 U.S.C. 704, and could be challenged under the Administrative Procedure Act. See also *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 162-163 (1967). *Frozen Food Express* v. *United States*, 351 U.S. 40, 45 (1956), held that an ICC "order" narrowly interpreting an exemption in a statute it enforced was "final" and ripe for review at the behest of a carrier adversely affected by the interpretation. Although the Court did not specifically address the issue in *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970), and *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), it necessarily assumed

That Congress used "final action" in this sense is evident from other provisions in Section 307(b)(1). EPA's determination in this case is akin to other types of actions specifically considered "final" under Section 307(b). For example, Section 307(b) makes "orders" under Section 112(c), 42 U.S.C. (Supp. I) 7412(c), reviewable only in the courts of appeals. Section 112(c) prohibits the construction of any new source which will "in the Administrator's judgment" emit "hazardous air pollutants" for which the Administrator has set a standard unless, among other things, "the Administrator finds that such source if properly operated will not cause emissions in violation of such standard * * *."[11] EPA has no formal procedures for making such judgments, and the statute specifies none. Consequently, such determinations are made by written inquiry and a letter response by the agency. An inquiry to the Administrator for his "judgment" whether a facility would emit hazardous air pollutants and, if so, for his determination that its proper operation would meet the

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in those cases that the Comptroller's interpretive regulations challenged in those cases were final agency actions.

[11] Similarly, Section 307(b) permits review in the court of appeals of "any order under section 111(j)." Section 111(e), 42 U.S.C. (Supp. I) 7411(e), prohibits the operation of new sources in violation of the new-source standards. Section 111(j), 42 U.S.C. (Supp. I) 7411(j), allows "[a]ny person proposing to own or operate a new source" to "request the Administrator for one or more waivers" in order to "encourage the use of an innovative technological system or systems of continuous emission reduction." The Administrator may grant the request after a public hearing. He may deny it without a hearing. Such "orders" are reviewable under Section 307(b). Once again, a denial of such a request is akin to a denial of PPG's request for a determination that its facility is not subject to the new source regulations at all. The activity in question has not yet occurred but is known. It is important to the requesting party to have a final agency determination and judicial review of the determination rather than to proceed at its peril.

specified effluent levels, is very similar to PPG's request under 40 C.F.R. 60.5 for a determination whether its proposed boilers would be covered by the new-source regulations. In both cases, the new source is not yet operational but the pertinent facts are known. In both cases, no formal hearing is held. In both cases, the applicant has a legitimate need for a final resolution before it proceeds at its peril.[12]

II. The Legislative History Demonstrates That Congress Intended To Expand Jurisdiction Under Section 307(b) To Include EPA's Determination In This Case

From the legislative history of the 1977 Amendments it seems reasonably clear that Congress meant to place review of all "final agency actions," as that phrase is traditionally used, in the courts of appeals. Prior to the 1970 amendment, the Clean Air Act did not provide for preenforcement review. See 42 U.S.C. (1964 ed. Supp. V) 1857–1857e. The Clean Air Act Amendments of 1970, however, provided for exclusive preenforcement review in the courts of appeals of certain enumerated actions. Certain standards and regulations of a national character were made reviewable by the District of Columbia Circuit. Certain actions of regional or local significance were made reviewable in the appropriate regional circuit. See generally S. Rep. No. 91-1196, 91st Cong., 2d Sess. 40–42 (1970); H.R. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. 47–48 (1970).

[12] Contrary to the suggestion of the court of appeals (Pet. App. 15a), there is no redundancy in the coexistence of the specifically enumerated items and our interpretation of "any other final action." The use of the word "other" eliminates any redundancy. Moreover, it is a well-established tradition in drafting to indulge in some redundancy out of an abundance of caution to make sure that certain specific matters are treated in a certain way rather than to trust to judicial interpretations of general statutory guidelines.

In 1976, Congress considered—but did not enact—comprehensive amendments to the Act proposed by the House Committee on Interstate and Foreign Commerce. Those amendments would have added a number of specifically enumerated "regulations," "standards," "findings," and "actions" to the national and local lists of actions reviewable in the courts of appeals under Section 307(b). The amendment did not, however, mention any review of "any other final action." Cf. H.R. Rep. No. 94-1175, 94th Cong., 2d Sess. 295, 396-397 (1976).[13]

[13] The House Committee bill in 1976 would have amended Section 307(b)(1) to read in pertinent part:

> A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111 (b), *any finding of the Administrator under section 111(i)(7)(A), any regulation promulgated under section 111(d)(1), 121, 122, 123, 124(c), 125, 126(a), 152(f)(3), 154, 160, 207, or 302(i),* any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1) *or required to be prescribed under section 202(a)(3)(A) with respect to vehicles or engines manufactured during or after model year 1983),* any determination under section 202(b)(5) *or under section 202(a)(3)(B),* any control or prohibition under section 211, or any standard under section 231 *or under section 235* may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C), *or his action under section 121 (other than the promulgation of regulations),* or under regulations thereunder, *his action in imposing a fee under section 122, his action under section 127(b), his action in approving any plan or making any designation or redesignation under section 160,* may be filed only in the United States Court of Appeals for the appropriate circuit.

H.R. Rep. No. 94-1175, 94th Cong., 2d Sess. 396 (1976) (material that would have been inserted by the amendment is italicized).

In December 1976, the Administrative Conference of the United States (see 5 U.S.C. 571-576) issued recommendations for amendments to the Clean Water Act, 33 U.S.C. 1311 *et seq.* and the Clean Air Act. 41 Fed. Reg. 56767 (1976), 1 C.F.R. 305.76-4. The Conference observed, among other things, that under the Clean Air Act "it remains possible in some circumstances to obtain non-statutory review under general federal question jurisdictional statutes" because "[n]ot every action of the EPA under the Clean Air Act * * * is made reviewable in the courts of appeals" and that at least "[s]ome of the omissions appear to be inconsistent with the general statutory plan * * *." 1 C.F.R. 305.76-4(d)(3), (5).

Perhaps the overriding recommendation was in urging that

> when Congress reconsiders the judicial review provisions of the principal pollution statutes, it rationalize, alter and clarify them, guided especially by the principle that jurisdictional provisions should draw bright lines to minimize the waste and expense of litigation over whether a case has been brought in the right court. [1 C.F.R. 305.76-4(d).[14]]

[14]The Conference recommended, among other things, (a) that judicial review under the Clean Water Act be divided among the courts of appeals as under the Clean Air Act so that "review of * * * determinations affecting single states or facilities be had in the circuit containing the state or facility" (Recommendation A) (41 Fed. Reg. 56768 (1976)), and (b) that both acts enlarge the number of specifically enumerated items to be reviewed in the courts of appeals (Recommendation E). (The Conference did not mention or consider the possibility of placing review of "all final action[s]" in the courts of appeals.)

An amendment to Section 509 of the Clean Water Act, 33 U.S.C. 1369, similar to the 1977 amendment to Section 307(b)(1), was proposed in separate legislation but tabled. See Senate Committee on Environment and Public Works, A Legislative History of the Clean Water Act of 1977, 95th Cong., 2d Sess. 1012-1029 (1978).

It was against this background that a year later the House Committee on Interstate and Foreign Commerce again considered amendments to the Act. This time the committee, in revising Section 307(b), did not attempt to add more specifically enumerated items to the list of reviewable actions. Instead, the committee proposed simply to add all other "final actions" to both the national and regional review provisions of Section 307(b)(1):[15]

> A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard required to be

[15]Bracketed material was to be omitted and italicized material was to be added by the House committee amendment.

The committee proposed to revise the rest of Section 307(b) as follows:

> *Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.* [Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.] *Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. No determination of the Administrator under section 122 shall be reversed by the court unless such determination is unsupported by substantial evidence on the record.*

H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 440-441 (1977).

prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, [or] any standard under section 231, *any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act* may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, *or any other final action of the Administrator under this Act which is locally or regionally applicable* may be filed only in the United States Court of Appeals for the appropriate circuit.

The committee explained:

> Paragraph (1) of [Section 307(b)] makes it clear that any nationally applicable regulations promulgated by the Administrator under the Clean Air Act could be reviewed only in the U.S. Court of Appeals for the District of Columbia. These would include, to mention but a few examples, regulations to carry out the nonattainment policy referred to in section 117 of this bill and regulations to effectuate motor vehicle assembly-line test provisions of section 206 of the act or inspection/maintenance requirements under section 208 of this bill.
>
> [The first two sentences provide] for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court of appeals for the circuit in which such locality, State, or region is located. This provision applies, except as otherwise provided in paragraph (4), to the Administrator's action in approving or promulgating an implementation plan for any State.

H.R. Rep. No. 95–294, *supra*, at 323–324.

The committee thus made only one change in the two sentences establishing subject-matter jurisdiction. That change was to make "any other final action" not specifically enumerated reviewable in the courts of appeals. Since it was the only change, the committee obviously intended, in light of the otherwise parallel 1976 bill and Administrative Conference report, to enlarge jurisdiction and to enlarge it to all final actions. There is not the slightest indication that, as the lower court seems to have believed (Pet. App. 15a), the committee simply meant to confine review to the enumerated items. To the contrary, the House Report expressly cited examples (such as regulations to carry out the nonattainment policy referred to in Section 117 of the bill) of agency actions not expressly enumerated in Section 307(b)(1) which the committee intended to fall under "final action" (see page 20, *supra*). At no time, moreover, did the committee or the Congress refer to preenforcement review in the district courts.[16] All references were to preenforcement review in the courts of appeals.

The "final action" phrase appears to have been the committee's response to the difficult drafting problem of making sure that each action deserving of review under the exhaustive legislation was covered by Section 307(b)(1). From its 1976 drafting, the committee was aware of the tedious task of augmenting the lists of spe-

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[16] To be sure, the committee observed that it was adopting in large measure the "venue" recommendation of the Administrative Conference. H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 324 (1977). Necessarily, however, it was also enlarging the subject-matter jurisdiction of the courts of appeals, for it was only the augmentation of subject-matter jurisdiction to include all final actions that necessitated the new assignment of venue along the national-local dichotomy in the first place. Obviously, the venue for the specifically enumerated items in the prior law had already been allocated, and they were not changed by the committee proposal.

cifically reviewable actions. The committee was presumably familiar with the Administrative Conference's observation that at least some EPA actions regarded as "final agency action" under the APA were being reviewed by the district courts under federal-question jurisdiction (see note 16, *supra*). That in 1977 the committee did not attempt again to predict each EPA action worthy of judicial review seems to have been a response to these factors. Instead, the committee preferred the comprehensive language of "final action" to include not only the specific items but also any other final determinations.[17]

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[17] The House and Senate approved Section 307(b) as proposed by the House Committee. 123 Cong. Rec. H5150 (daily ed. May 26, 1977); S9478, S9490 (daily ed. June 10, 1977). Consistent with the intent to confine review of all final actions to the courts of appeals, the Conference Committee added Section 307(e), which provides that "[n]othing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section." 123 Cong. Rec. H8507, H8534 (daily ed. Aug. 3, 1977). This reinforces a congressional intention to place judicial review of all final agency decisions in the courts of appeals.

The Conference Committee added "any rule issued under section 120 (relating to noncompliance penalties)" to the list of specifically enumerated items in the first sentence and "any order under section 120" to the list in the second sentence. 123 Cong. Rec. H8535 (daily ed. Aug. 3, 1977). No explanation was given for this insertion. See 123 Cong. Rec. H8556 (daily ed. Aug. 3, 1977). The specification was arguably unnecessary to the extent that it would have been obvious such orders were final actions of local significance. As a drafting matter, however, it would not have been unusual to make such specifications out of an abundance of caution (see note 12, *supra*).

The same is true of the insertion of more specifically enumerated items in the "technical amendments" to the Act made a few weeks later in the Clean Air Act Technical and Conforming Amendments, Pub. L. No. 95-190, 91 Stat. 1399, 1404, which changed Section 307(b) to its present language. This amendment modified the first sentence to specifically enumerate regulations under Sections 113 and 119 and the second sentence to specifically enumerate regional review of orders under Sections 111(j), 112(c), 113(d) and 119 and made clear that orders issued under section 119(c)(2)(A), (B) or (C), as in effect before the 1977 amendments, were to be reviewed in the regional courts of appeals. The very brief legislative history on these amendments shows they were added to implement the "conference agreement providing for review of grant or denial of locally applicable orders in the appropriate circuit court, and review of nationally applicable regulations in the D.C. Circuit Court." 123 Cong. Rec. S18372-18373 (daily ed. Nov. 1, 1977); 123 Cong. Rec. H11956-H11957 (daily ed. Nov. 1, 1977).

The Fifth Circuit's contrary view of the legislative history was based on the absence of any mention in the legislative history of a "massive shift" of jurisdiction to the court of appeals (Pet. App. 15a). Aside from the fact that committee reports need not say what is already obvious, the House Report clearly states that the amendment "provides for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U. S. court of appeals for the circuit in which such locality, State, or region is located." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 323 (1977). By contrast, there is no mention of judicial review in the district courts. Moreover, although the number of actions comprehended by "any other final action" is substantial, it would not seem so "massive" that it ineluctably would have provoked comment in the legislative history.

III. The Court of Appeals Incorrectly Concluded That Channeling Review Through the District Court Would Advance Preenforcement Review

The mainstay of the court of appeals' holding was its view that preenforcement review of EPA's determination in this case (and other actions not specifically enumerated in Section 307(b)(1)) would be better served by review in the district courts where, if necessary, "skeletal" administrative records could be aug-

mented by discovery and further fact finding (Pet. App. 17a-20a). This argument is unpersuasive for five reasons.

First, we do not think that the administrative record in this case is "skeletal." PPG had ample opportunity to submit all the information it felt was relevant to the determination, and EPA requested further facts it concluded were relevant. That information is contained in the administrative record.

Second, as we have seen (pages 15–16 and note 11, *supra*), the administrative record in the present case is comparable to the administrative record created during EPA actions under provisions in the Clean Air Act that are specifically required to be reviewed in the courts of appeals by the second sentence of Section 307(b)(1), such as actions under Sections 111(j) and 112(c). It is therefore hard to conclude that Congress intended to exclude from Section 307(b)(1) EPA actions based on similar administrative records.

Third, the court below thought that routing such cases through the district courts would advance preenforcement review by permitting fact development through discovery. Legal issues, however, may be resolved without discovery. Indeed, factual issues are usually resolved by the agency subject only to judicial review to determine whether the findings are based on substantial evidence or are not arbitrary. 5 U.S.C. 706. More fundamentally, if an administrative record is too skeletal to permit meaningful judicial review, the court — whether trial or appellate — must remand to the agency for further determination, not conduct evidentiary proceedings in court. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *Camp* v. *Pitts*, 411 U.S. 138, 141-143 (1973); cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971).

Fourth, the basic purpose of Section 307(b)(1) — to provide preenforcement review — would be better

served by requiring review in the court of appeals of determinations such as the one at issue. One of the purposes of preenforcement review is to permit prompt review of an agency's interpretation of the law it enforces before affected persons act at their peril. See generally *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148–156 (1967); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 170–174 (1967); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164–165 (1967). That purpose would have been served in this case had the court of appeals resolved the legal issue that casts a shadow over PPG's plans. PPG would have obtained a definitive ruling on the extent and type of abatement equipment required by the Act in order to operate the project rather than having to choose a course of action at the risk of choosing incorrectly. Another purpose of preenforcement review under the Clean Air Act, as the Court observed concerning Section 307(b) in *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284 (1978), is to assure that EPA's actions are promptly and finally reviewed in order to eliminate undue delay in achieving the goals of the statute. See generally S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41 (1970). Congress specifically precluded judicial review in enforcement actions of any action reviewable under Section 307(b)(1). See Section 307(b)(2), 42 U.S.C. (Supp. I) 7607(b)(2). EPA's reviewable actions are thus final unless challenged on preenforcement review within 60 days.[19] The objective of prompt and final review would have been better served had the court of appeals resolved the question of law at issue. A ruling favorable to EPA would have al-

[19] Section 307(b)(1) provides that a preenforcement review may be sought within 60 days after publication in the Federal Register of the nature of the "action" taken. Aside from defining precisely the time period within which review may be sought, this provision eliminates any possibility that judicial review would be precluded altogether because the affected person miscalculates and assumes the administrative action is not a

lowed it to apply the same legal principle in other cases with confidence in its validity at least within the Fifth Circuit. An adverse ruling would have permitted EPA to reconsider its legal theory.

Finally, if preenforcement review is unavailable in the court of appeals because the action is not "final," then, contrary to the assumption of the court of appeals (Pet. App. 11a), preenforcement review is not available at all—even in the district courts. As here, only "final agency action" is reviewable under the Administrative Procedure Act. 5 U.S.C. 704. Such a result would frustrate the purposes of preenforcement review. It would also contravene the established rule that adverse agency action is presumed to be subject to effective judicial review. *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 141.[20]

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final agency action. Publication in the Federal Register will put such persons on notice that the agency regards the action as final. They may then seek preenforcement review if they have not already.

EPA did not publish the PPG determination. The only effect of this lapse is a tolling of the running of the 60-day limitation on review. EPA has adopted a policy of publishing in the Federal Register notice of actions such as the determination made in this case. In addition, EPA now has a practice of advising parties such as PPG that the agency regards its action as final and that failure to seek timely preenforcement review will preclude any challenge to the determination in subsequent enforcement actions.

In this connection, EPA enforcement proceedings at the agency level are not "final actions" reviewable under Section 307(b)(1). Once agency action has reached the enforcement stage, preenforcement review is no longer available. See H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 324 n.12 (1977), citing *Lloyd A. Fry Roofing Co.* v. *EPA*, 415 F. Supp. 799 (W. D. Mo. 1976), later affirmed, 554 F.2d 885 (8th Cir. 1977).

[20] Even if preenforcement review were available in the district courts, as the court below held (Pet. App. 11a), direct resolutions by the courts of appeals eliminate a layer of judicial

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and the case remanded for consideration of the merits.

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review and thereby allow more prompt validation or rejection of EPA's construction of the Act and its regulations.

It does not follow, however, that the court of appeals must automatically exercise its jurisdiction to review every final action by EPA under the Act challenged in the court of appeals. As *Toilet Goods Ass'n*, v. *Gardner*, 387 U.S. 158, 162-164 (1967), illustrates, "final agency action" may not, in some circumstances, be ripe for judicial review. Cases may arise under the Clean Air Act where a formal determination by EPA under 40 C.F.R. 60.5 is final but based on sketchy facts and highly hypothetical contingencies. See *New York Stock Exchange* v. *Bloom*, 562 F.2d 736, 740-742 (D.C. Cir. 1977). In such a case, the court of appeals might well dismiss the petition as premature. Given the concrete facts and live controversy in the present case, however, such a dismissal on ripeness grounds (a course of action not considered below) would not have been proper.

APPENDIX

Excerpts from 40 C.F.R. 60.5–60.43

§60.5 Determination of construction or modification.

(a) When requested to do so by an owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part.

(b) The Administrator will respond to any request for a determination under paragraph (a) of this section within 30 days of receipt of such request.

* * * * *

Subpart D—Standards of Performance for Fossil-Fuel Fired Steam Generators

§60.40 Applicability and designation of affected facility.

(a) The affected facilities to which the provisions of this subpart apply are:

(1) Each fossil-fuel-fired steam generating unit of more than 73 megawatts heat input rate (250 million Btu per hour).

(2) Each fossil-fuel and wood-residue-fired steam generating unit capable of firing fossil fuel at a heat input rate of more than 73 megawatts (250 million Btu per hour).

(b) Any change to an existing fossil-fuel-fired steam generating unit to accommodate the use of combustible materials, other than fossil fuels as defined in this subpart, shall not bring that unit under the applicability of this subpart.

(c) Except as provided in paragraph (d) of this section, any facility under paragraph (a) of this section that

commenced construction or modification after August 17, 1971, is subject to the requirements of this subpart.

(d) The requirements of §§60.44(a)(4), (a)(5), and (b) and (d), and 60.45(f)(4)(vi) are applicable to lignite-fired steam generating units that commenced construction or modification after December 22, 1976.

§60.41 Definitions.

As used in this subpart, all terms not defined herein shall have the meaning given them in the Act, and in Subpart A of this part.

(a) "Fossil-fuel fired steam generating unit" means a furnace or boiler used in the process of burning fossil fuel for the purpose of producing steam by heat transfer.

(b) "Fossil fuel" means natural gas, petroleum, coal, and any form of solid, liquid, or gaseous fuel derived from such materials for the purpose of creating useful heat.

(c) "Coal refuse" means waste-products of coal mining, cleaning, and coal preparation operations (e.g. culm, gob, etc.) containing coal, matrix material, clay, and other organic and inorganic material.

(d) "Fossil fuel and wood residue-fired steam generating unit" means a furnace or boiler used in the process of burning fossil fuel and wood residue for the purpose of producing steam by heat transfer.

(e) "Wood residue" means bark, sawdust, slabs, chips, shavings, mill trim, and other wood products derived from wood processing and forest management operations.

(f) "Coal" means all solid fuels classified as anthracite, bituminous, subbituminous, or lignite by the American Society for Testing Material. Designation D 388–66.

§60.42 Standard for particulate matter.

(a) On and after the date on which the performance test required to be conducted by § 60.8 is completed, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from any affected facility any gases which:

(1) Contain particulate matter in excess of 43 nanograms per joule heat input (0.10 lb per million Btu) derived from fossil fuel or fossil fuel and wood residue.

(2) Exhibit greater than 20 percent opacity except for one six-minute period per hour of not more than 27 percent opacity.

§60.43 Standard for sulfur dioxide.

(a) On and after the date on which the performance test required to be conducted by §60.8 is completed, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from any affected facility any gases which contain sulfur dioxide in excess of:

(1) 340 nanograms per joule heat input (0.80 lb per million Btu) derived from liquid fossil fuel or liquid fossil fuel and wood residue.

(2) 520 nanograms per joule heat input (1.2 lb per million Btu) derived from solid fossil fuel or solid fossil fuel and wood residue.

(b) When different fossil fuels are burned simultaneously in any combination, the applicable standard (in ng/J) shall be determined by proration using the following formula:

$$PS_{so_2} = [y(340) + z(520)]/y + z$$

Where:

PS_{so_2} is the prorated standard for sulfur dioxide when burning different fuels simultaneously, in nanograms per joule heat input derived from all fossil

fuels fired or from all fossil fuels and wood residue fired.

y is the percentage of total heat input derived from liquid fossil fuel, and

z is the percentage of total heat input derived from solid fossil fuel.

(c) Compliance shall be based on the total heat input from all fossil fuels burned, including gaseous fuels.

* * * * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1918

ADLENE HARRISON, Regional Administrator, and DOUGLAS COSTLE, Administrator of the Environmental Protection Agency,
Petitioners,

v.

PPG INDUSTRIES, INC. and CONOCO, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1918

ADLENE HARRISON, Regional Administrator, and DOUGLAS COSTLE, Administrator of the Environmental Protection Agency,
Petitioners,

v.

PPG INDUSTRIES, INC. and CONOCO, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

The question posed by petitioners ("EPA" or "the Agency") would be stated more accurately as follows:

> Whether the court of appeals has original *and exclusive* jurisdiction under Section 307(b)(1) of the Clean Air Act, as amended, 42 U.S.C. § 7607(b)(1), to review a final action by the Administrator applying new-source performance standards to certain power generating facilities.

As EPA would have it, the courts of appeals have original and exclusive jurisdiction to review the Agency's action in applying regulatory standards to particular facilities. Indeed, EPA's arguments would extend an exclusive and original review jurisdiction of courts of appeals to any and all actions, of any type or description, taken by the Agency under the Clean Air Act, as amended ("the Act"), 42 U.S.C. §§ 7401-7642. EPA's position depends entirely upon the construction to be accorded to the phrase "other final action" used twice in Section 307(b)(1) of the Act, which otherwise specifically enumerates actions which are to be subject to review in courts of appeals. The judicial review provisions in Section 307(b) and in other parts of the Act either can be construed to reconcile the statutory language and Congress' intent, or can be construed to read broadly the two "other final action" phrases (as EPA urges) to produce contradictory and conflicting results with other parts of the Section and Act. This Court should seek the interpretation which best reconciles the statutory provisions. Respondents ("PPG" and "Conoco") contend that under such a reconciling interpretation courts of appeals do not have jurisdiction under the "other final action" phrase to review EPA's action in applying regulations. No other basis for jurisdiction of courts of appeals exists, and the decision of the Court of Appeals for the Fifth Circuit dismissing PPG's "protective" petition for lack of jurisdiction should be affirmed.

However, this case has an additional facet which strongly supports adoption of a reconciling interpretation. In the court of appeals PPG raised a further issue regarding jurisdiction which both PPG and Conoco wish to maintain before this Court. PPG contended that constitutional issues would arise with an expansive reading of the "other final action" phrases in Section 307(b)(1).

Section 307(b)(1) both specifies the actions subject to review in a court of appeals and requires that petitions

for review brought under its provisions must be filed within sixty days of the date on which notice of the action is given in *the Federal Register*. The immediately subsequent provision of the Act, Section 307(b)(2), operates in civil or criminal enforcement cases to preclude the presentation of defenses based upon matters which could have been raised in a review action brought in a court of appeals under Section 307(b)(1).[1] By their terms, the judicial-review provision and the review-preclusion clause are coextensive in scope.

PPG argued in the court of appeals that, if the review provision (any "other final action . . . which is locally or regionally applicable") were construed to pertain to any final local or regional action, of whatever nature, taken by EPA, the provision would violate the due process clause of the fifth amendment to the Constitution and should be given no effect. See Brief For Petitioner in the court of appeals, at 50. Many of the Agency's very informal actions would be brought within the compass of Section 307(b)(1), were that Section construed as expansively as EPA here argues. For many of these actions, review might not be actually sought in a court of appeals;[2] yet, the review preclusion clause would fore-

[1] This "review preclusion" clause is very harsh. A similar provision limiting judicial review of regulations under wartime price control legislation was upheld against due process objections by this Court in *Yakus* v. *United States*, 321 U.S. 414, 434-437 (1944).

[2] EPA can and does take a large number of "final actions" under the Act in a very informal way, as illustrated by the facts in the present case. See *infra*, at 5. These informal actions are not taken on the basis of a contemporaneously compiled administrative record. They include the Agency's decision to grant preconstruction approval for a new or modified facility located in a State which does not itself undertake such preconstruction review. Preconstruction review is required by Section 110(a)(2)(D) of the Act, 42 U.S.C. § 7410(a)(2)(D), and 40 C.F.R. § 51.18. For example, Mississippi does not provide preconstruction review, so EPA itself carries out this regulatory function within that State. See 40 C.F.R. § 52.1276. Another informal action by EPA is the

close defenses. In effect, the pair of provisions would combine to bar the opportunity to obtain judicial recourse or to present every available defense. The statute thus runs afoul of the due process clause. See *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972); *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932).

The court of appeals construed the judicial-review provisions of the Act to avoid the necessity of reaching this constitutional claim. In this Court, PPG and Conoco do not wish to abandon the claim, and accordingly must reiterate it now. Because the claim does not attack the decree and judgment of the court of appeals, but rather "merely asserts additional grounds why the decree should be affirmed," the claim is properly before the Court. *Langnes* v. *Green*, 282 U.S. 531, 539 (1931). See also *Jaffke* v. *Dunham*, 352 U.S. 280 (1957); *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 n.5 (1947); *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435-436 (1924) (Brandeis, J.)[3]

Agency's decision to "blacklist" a particular facility (bar the facility from supplying goods or services to the federal government) under Section 306(c) of the Act, 42 U.S.C. § 7606(c), and 40 C.F.R. Part 15.

Included also are several minor and very repetitive types of "final" actions. Such actions include a decision by an EPA technician not to pass an individual car during a motor vehicle emissions inspection, where EPA establishes its own regulations and facilities to carry out such inspections upon failure of a State to do so. See Section 110(a)(2)(G) of the Act, 42 U.S.C. § 7410(a)(2)(G). Cf. *Environmental Protection Agency* v. *Brown*, 431 U.S. 99 (1977). Persons aggrieved by such minor actions would not be likely to carry their dispute with EPA to a court of appeals for review.

[3] As the Court said in *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977):

> [T]he prevailing party may defend a judgment on any ground which the law and record permit that would not expand the relief it has been granted.

The additional question reflecting PPG's and Conoco's constitutional claim can be stated as follows:

> If the clause in Section 307(b)(1) of the Act which calls for review in courts of appeals of unspecified "other final action . . . which is locally or regionally applicable" were to be construed as expansively as EPA here advocates, would it violate the due process clause in light of the coextensive review-preclusion provision of Section 307(b)(2)?

EPA's brief neither mentions nor discusses the constitutional facet of this case. Significantly, EPA's brief also fails to mention, let alone discuss, several statutory provisions which would be nullified if its expansive reading of the "other final action" phrases in Section 307(b)(1) were to be adopted. The most important of these ignored provisions is Section 206(b)(2)(B) of the Act, 42 U.S.C. § 7525(b)(2)(B), which sets out a special judicial-review procedure. EPA also has provided a severely truncated exegesis of the legislative history of amendments to the Act, which avoids many pertinent materials. In addition, EPA omits any reference to a uniform line of decisions in the courts of appeals construing special review provisions in this and other similar statutes contrary to the Agency's position here. EPA's complete failure to deal with these points unfortunately requires that this brief be longer than otherwise would be necessary.

SUPPLEMENTAL STATEMENT

PPG and Conoco do not quarrel with EPA's Statement, as far as it goes. In arguing the merits, however, EPA says it "do[es] not think that the administrative record in this case is 'skeletal'" (EPA's Br. at 24), notwithstanding the expressed view of the court of appeals to

the contrary. (587 F.2d at 244-245, Pet. App. 17a-20a.)[4] The court of appeals had a sound basis in the record for its opinion, and this supplemental statement will focus on that basis.

The entire certified record consists of 97 pages of correspondence.[5] The court of appeals noted that this record "may leave the reviewing court unable to verify the Administrator's grounds [for his determinations], or, perhaps, to identify those grounds at all." (587 F.2d at 244, Pet. App. 17a.)

The record shows that EPA determined PPG's "waste heat" boilers to be "new sources" subject to the Agency's Standards of Performance for Fossil-Fuel Fired Steam Generating Units (the "new source standards" or the "standards"). (A. 97-98, 104-106.) However, EPA did not actually apply the requirements of the new source standards to the waste-heat boilers. Instead the Agency imposed special *ad hoc* requirements drawn in part from the standards and in part from its own fiat. The record shows no basis, factual or legal, for this aspect of EPA's determinations.[6]

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[4] Several abbreviations are used in this brief. "Pet. App." refers to the appendix to the petition for certiorari. "A." refers to the Appendix to the Briefs, where the entire administrative record is reprinted. "EPA's Br." refers to petitioner's opening brief on the merits.

To avoid lengthy citations to provisions of the Clean Air Act, 42 U.S.C. §§ 7401-7642, this brief will cite only the sections of the Act itself, after an initial citation which includes also the corresponding section of the codification in Title 42 of the United States Code.

[5] As reprinted in the Appendix to the Briefs, this record takes up 108 pages.

[6] The problems arising due to the deficiencies in the record are compounded by EPA's *volte face* in "applying" the standards to the

1. The waste-heat boilers are an integral part of a power plant employing advanced "cogeneration" technology.

The term "cogeneration" is used to denote energy-efficient production both of electricity and of process steam at one power plant. PPG has a large multi-plant chemical works at Lake Charles, Louisiana ("Lake Charles Works" or "Works"), which requires significant amounts of both electricity and steam for its process operations. In these circumstances, use of cogeneration technology can provide a dependable source of power plus large savings in energy.

PPG's "Power Plant C" at the Lake Charles Works is a coordinated system consisting of two gas turbine generators, two "waste heat" boilers, and one steam turbo-generator.[7] Each gas turbine produces electricity from combustion of natural gas.[8] The exhaust gases from the turbines ordinarily would be vented to the atmosphere. However, because these exhaust gases contain considerable

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waste-heat boilers. Compare A. 102 (letter of August 3, 1977—standards apply only when 100% fossil fuel is used in the boilers) with A. 104-106 (letter of August 18, 1977—continuous operating and monitoring requirements imposed, with further monitoring and reporting requirements to be developed and put into effect regarding the sulfur content of the fuel used).

Moreover, EPA's Decision to impose *ad hoc* requirements contrasts sharply with its decision at the outset to subject the waste-heat boilers to the standards. PPG's special design and use of the waste-heat boilers as integral parts of the overall cogeneration system was completely ignored by EPA in its decision that the boilers were subject to the standards. See *infra*, at 9-10 & nn. 12-13.

[7] This factual summary is taken from the description set out by the court of appeals (587 F. 2d at 238-239, Pet. App. 2a-3a) and the record (A. 15-22, 27-29, 34-48, and 51-58) except as may be specifically noted.

[8] The General Electric gas turbines can also use oil of certain specifications as fuel. (A. 48.)

residual heat, in PPG's unit the gases are routed to the waste-heat boilers. There the heat in the exhaust gases, plus heat from firing supplemental fuel,[9] is used to generate high-temperature, high-pressure steam. Only then are the spent exhaust gases discharged to the atmosphere. The high-temperature, high-pressure steam produced by the waste-heat boilers is supplied to the steam turbogenerator to make electricity, and the resulting lower-temperature, reduced-pressure steam is used in chemical processing operations at the Lake Charles Works.[10] Similarly, the electricity generated by the gas

[9] This supplemental fuel can be either natural gas, fuel oil, or hydrogen.

[10] As the court of appeals said:

> This exhaust from the turbines contributes nearly 40% (approximately 371 million British thermal units per hour) of the total input to the waste heat boiler, while the remaining heat (approximately 598 million British thermal units per hour) is provided by combustion of fuel oil or natural gas. (587 F.2d at 239. Pet. App. 2a-3a.)

The heat from the turbine exhausts is sufficient by itself (*i.e.*, without heat from supplemental fuel) to make steam of medium pressure and temperature in the boilers. However, some supplemental fuel must be used in at least one of the two waste-heat boilers to generate steam of sufficiently high temperature and pressure so that the steam turbogenerator may be used to generate electricity. When no supplemental fuel is used in either of the boilers, the steam is not at a temperature or pressure sufficient to prevent the steam from condensing on the final blades of the steam turbogenerator. If the steam were allowed to condense on the blades, corrosion would set in and damage the turbine.

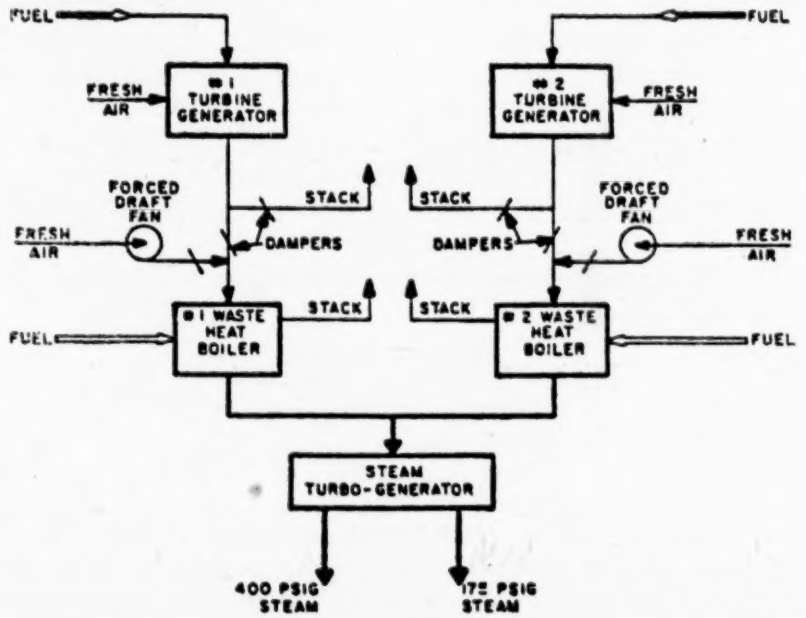
The entire system is controlled by computer, to allow the output of the coordinated components to be governed by the plant's needs. The key determinant is the plant's steam requirement. The turbogenerator is operated to pull off or extract the appropriate amount of steam for the plant. The electrical output of the turbogenerator varies accordingly, depending both upon the amount of steam ex-

turbines and the steam turbogenerator is entirely used at the Works. The energy savings are notable.[11]

The dispute over the applicability of the new source standards stems from two root causes. First, PPG began to construct the coordinated *unit* in 1970, well prior to August 17, 1971, the applicability date of the new source standard.[12] Second, EPA's new source standards do not

tracted for plant use and upon the amount of steam sent to the turbo-generator by the waste-heat boilers.

The following diagram represents the system (but does not show electrical output):



[11] The cogeneration aspects of the system save energy equivalent to 1 million barrels (42 million gallons) of oil per year.

[12] PPG completed plans for the system in 1970, and on November 11, 1970 entered into a contract with General Electric Co. for purchase of the two gas turbines and the turbogenerator. (A. 52, 54-58.) The purchase contract allowed PPG to cancel the contract without penalty on or before May 1, 1971. (A. 56.) The contract could be cancelled from that date to June 1, 1971, upon payment of a set fee. (*Id.*) PPG advised EPA in 1976 that:

> The purchase of the gas turbines and turbogenerators in 1970 represents a commitment of $9.4 million, covering two-thirds

refer to "waste heat" boilers and were not developed with cogeneration systems in mind.[13] In the standards, EPA did not take into account any of the particular air-emission control problems arising with such systems.

2. The record contains no explanation or factual support for EPA's determination to impose *ad hoc* requirements not found in its standards.

EPA's actions in the present case illustrate several of the difficulties in applying the current new source standards to cogeneration units, or more specifically to the boiler segment of such units. The record nonetheless contains no explanation by EPA or factual support for the Agency's *ad hoc* imposition of requirements not found in the standards.

In EPA's letter of June 8, 1977, which responded to PPG's request for a determination of applicability, the

---

of the equipment purchased in the combined cycle power plant. (A. 52.)

EPA refused to consider the fact that the waste-heat boilers by design could not practically function except as part of the coordinated total unit. In a letter dated December 22, 1976, an official of EPA's Region VI stated:

> Even though you [PPG] may have ordered equipment [the steam turbogenerator] before the date of the proposed regulations that would be completely useless without the steam generators [the "waste heat" boilers] that action would be irrelevant to determine the applicability of the regulations to the two steam generators.
>
> We hope that this discussion makes it clear why the two steam generators are subject to the provisions of the Standards of Performance for New Stationary Sources, 40 C.F.R. Part 60. (A. 59.)

[13] As EPA's Director of Stationary Source Enforcement said in a memorandum to an official in EPA's Region VI Office,

> the Agency, when it established NSPS for fossil-fuel steam generators on December 23, 1971, had gathered data for *only* units which burn 100 percent fossil fuel. (A. 96 (emphasis in the original).)

Agency said the waste-heat boilers were subject to the standards because they were capable of operating without any waste-heat contribution (*i.e.*, with heat derived 100 percent from fuel burned in the boiler) at the requisite quantitative level for coverage (250 million British thermal units per hour). (A. 97.) This determination, however, did not focus on the ordinary mode of operation of the waste-heat boilers, where substantial heat is contributed by exhaust gases from the gas turbines. In normal operation, the boilers emit a stream of inextricably commingled air and pollutants stemming both from the gas turbines and from the fuel fired as a supplemental heat source in the boilers. Because the pollutants from these two sources cannot be segregated, the quantitative limits in the standards for emissions of particulate, sulfur dioxide, and nitrogen oxides could not be applied.

PPG's request for a clarification (A. 99-101) was answered by a letter dated August 3, 1977, in which EPA's Director of Stationary Source Enforcement stated that the standards would apply only during a performance test or other periods when the boilers were operating entirely using fossil fuel. (A. 102.)

This determination had a short life. On August 18, 1977, the Director by letter retracted the August 3rd determination and instead imposed specific requirements to be applicable to the operations of the waste-heat boilers at all times. (A. 104-106.) He stated that PPG was not required to install equipment for or conduct the continuous monitoring for sulfur dioxide (SO_2), nitrogen oxides (NO_x), or carbon monoxide (CO) mandated by the standards. Thus, when operated normally with heat derived from the turbine exhausts, the boilers would not be subject to the emission limits for those pollutants in the standards. However, PPG would be required at all times to burn in the boilers fuel which contained amounts of sulfur equal to or less than a sulfur

level to be specified as a result of performance tests conducted in compliance with the standards, when the boilers were operated with 100-percent fossil fuel (no waste-heat contribution). PPG would be required to install and operate continuous opacity monitors in the stacks of the waste-heat boilers (presumably to assess particulate emissions), and it would also be required to "perform some form of alternative monitoring" which could include a requirement to monitor and report on the sulfur content of any supplemental fossil fuel burned in the boilers. (A. 105.)

EPA thus did not actually apply the standards to the waste-heat boilers. Among other things, the standards themselves do not prescribe fuel requirements, nor do they authorize EPA officials to establish fuel requirements in particular cases. In effect, EPA imposed new, *ad hoc* requirements for the waste-heat boilers under the guise of applying the standards. Most importantly for present purposes, the record contains no evidence or information relating specifically to the requirements which were chosen.[14]

During the pendency of this litigation to review EPA's determinations, PPG has operated the waste-heat boilers

[14] As noted previously, the materials gathered by EPA to develop the new source standards similarly do not address emissions either from cogeneration units or from units burning waste materials (*e.g.*, bark, wood residues, or garbage) as well as fossil fuels. See *supra*, at 10, n.13. Since the standards were originally adopted in December 1971, EPA amended the standard to take into account blending of wood residue and fossil fuel, both during the performance tests and thereafter during operation. (A. 96.) In EPA's words, these amendments apply "to no other combination of fossil fuel and waste material" (*id.*), and certainly do not apply to "waste" hot gases. The exhaust gases from the turbines are not "burned" at all in the "waste heat" boilers. *Id.*

in compliance with requirements specified by EPA.[15] PPG nonetheless remains very concerned that reliable and economic low-sulfur fuel sources may not be available for use with the cogeneration system. PPG's fuel supplier, Conoco, in the last several months increasingly has exercised its contractual option to make fuel switches, as the letter reprinted in Appendix A, *infra*, illustrates.

SUMMARY OF ARGUMENT

The court of appeals correctly dismissed a "protective" petition for review filed by PPG regarding EPA's action in determining that the Agency's new source standards applied to "waste heat" boilers comprising part of a cogeneration power system at PPG's plant in Lake Charles, Louisiana. EPA's action was "final" and "locally and regionally applicable" within the meaning of Section 307(b)(1) of the Clean Air Act, but the Agency's action was not one of those specified with particularity in the Section. Jurisdiction in the court of appeals had to arise, if at all, from the "other final action" phrase added to the second sentence of Section 307(b)(1) by the

[15] PPG has complied with the standards largely by using natural gas as the supplemental fuel for the waste-heat boilers. As prescribed by the standards, performance tests with natural gas were carried out on the first waste-heat boiler on August 24, 1977 (App. 97), and on the second waste-heat boiler on May 3, 1979. Letter from James E. Wyche, III to Diana Dutton, Director, Enforcement Division, EPA Region VI (June 21, 1979). In each such test, the boilers met the requirements established by the standards and EPA's ruling of August 18, 1977.

Subsequently, PPG has notified EPA of the occasions when Conoco, the supplier of fuel to the Works under a requirements contract, has chosen to supply fuel oil rather than natural gas. An example of these notices (Letter from F. Ann Corbello to Diana Dutton, Director, Enforcement Division, EPA Region VI (December 3, 1979)), is reprinted *infra* as Appendix A to this brief.

Fuel oil of 0.7% sulfur content or less has been calculated to satisfy the requirements of EPA's letter ruling of August 18, 1977. Under otherwise applicable Louisiana regulations, the boilers would have to use fuel oil with a sulfur content of 1.0% or less.

Clean Air Act Amendments of 1977. The phrase will not support the expansive jurisdictional reach which EPA presses on this Court.

EPA insists that all final actions taken by the Agency, of any nature whatsoever, must be reviewed in courts of appeals under Section 307(b)(1). This very broad reading of the "other final action" phrases in the Section creates a direct conflict between those phrases and the other judicial review provisions in Section 307(b)(1) and elsewhere in the Act.

EPA's expansive reading would create the situation in which actions specifically excepted from review in courts of appeals because of a parenthetical exclusion in the first sentence of Section 307(b)(1) would be brought back into the ambit of review in courts of appeals by the general "other final action" phrase. Moreover, EPA's reading would nullify entirely the special judicial review provisions found separately in Section 206(b)(2)(B) of the Act. This Court should reject EPA's arguments and adopt the construction of Section 307(b)(1) which best reconciles these potentially conflicting provisions bearing on judicial review.

EPA also ignores completely the interpretation given to Section 307(b)(1) prior to the 1977 Amendments, and Congress' failure to indicate in any way that it wished to override this prior interpretation by enacting the Amendments. Indeed, Congress gave no signal of any kind that it wished to make the massive change in the Act's allocation of review jurisdiction between courts of appeals and district courts which would be the result of EPA's reading of the "other final action" phrases in Section 307(b)(1).

Prior to 1977, the courts of appeals uniformly construed Section 307(b)(1) such that jurisdiction to review EPA's actions in applying standards to particular

facilities rested with district courts rather than courts of appeals. *E.g.*, *Utah Power & Light Co.* v. *Environmental Protection Agency*, 553 F.2d 215 (D. C. Cir. 1977). The provisions in Section 307(b)(1) were strictly construed, and EPA's determinations regarding application of its regulations were not among the items specified in Section 307(b)(1) for review in courts of appeals.

As part of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 776, Congress added several further explicitly enumerated actions to those subject to special review in courts of appeals. It also added the phrase "other final action" both to the first sentence of Section 307(b)(1) providing for review of nationally applicable actions in the D.C. Circuit and to the second sentence of Section 307(b)(1) providing for review of locally and regionally applicable actions in the U.S. Court of Appeals for the "appropriate" circuit. These changes were based upon recommendations of the Administrative Conference which were addressed to venue questions, not jurisdiction. Congress specifically stated it was not acting on the recommendations of the Administrative Conference relating to jurisdiction. Moreover, shortly thereafter, Congress enacted the Clean Air Act Technical and Conforming Amendments, Pub. L. No. 95-190, § 14, 91 Stat. 1393, 1399 (1977), in which a number of other actions were made specifically reviewable in courts of appeals. These "necessary" technical changes would not have been warranted if the "other final action" phrase was intended to reach the extraordinarily wide range of matters which EPA now urges it covers.

EPA's exhortations for an expansive reading also run afoul of the uniform line of decisions in the courts of appeals construing the special judicial-review provisions of the Clean Air Act "narrowly" and "strictly", just as the courts of appeals have similarly construed comparable provisions in the Clean Water Act and the Noise Control Act. Courts have been troubled by the harsh terms of

the coextensive review-preclusion clause found in Section 307(b)(2) of the Act, and comparable provisions in the other acts. See *Utah Power & Light Co.* v. *Environmental Protection Agency*, 553 F.2d 215, 219 n.19 (D.C. Cir. 1977); *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F. 2d 904, 910 & n. 59, 914 (D.C. Cir. 1979). They have also been cognizant of the difficulty the courts of appeals have in reviewing agency decisions not taken on the basis of a definite and contemporaneously compiled administrative record. See *Crown Simpson Pulp Co.* v. *Costle*, 599 F.2d 897, 900 (9th Cir. 1979), *cert. pending*, No. 79-797.

EPA also would use the general "other final action" phrase to expand the reach of Section 307(b)(1) very greatly beyond the compass provided by those actions specifically enumerated in Section 307(b)(1) as subject to review in the courts of appeals. The enumerated actions call for action by EPA on the basis of a definite record stemming from administrative proceedings based at least on notice and an opportunity to comment. By contrast, many of the actions EPA would sweep into the special review provisions do not have to be and are not taken by EPA on the basis of a record but rather are taken very informally, perhaps only on the basis of correspondence as in the present case. In the circumstances, the rule of *ejusdem generis* should be applied, to limit the general "other final action" phrase to matters similar to those covered in the preceding enumerated references. See *Fitch Co.* v. *United States*, 323 U.S. 582, 585-586 (1945); *Smith* v. *Davis*, 323 U.S. 111, 116-117 (1944); *United States* v. *Salen*, 235 U.S. 237, 239 (1914); *United States* v. *Stever*, 222 U.S. 167, 174-175 (1911); *Bigelow* v. *Forrest*, 9 Wall. (76 U.S.) 339, 348-349 (1869). Compare *United States* v. *Powell*, 423 U.S. 87, 91, (1975); *United States* v. *Alpers*, 338 U.S. 680, 682 (1950).

EPA also denigrates the ability of district courts to review federal agency action. EPA's criticisms are misplaced, for both the courts of appeals and legal commentators have recognized that district courts are better suited than courts of appeals to deal with agency action taken on an ill-defined administrative record.

EPA's reading of the judicial review provisions of Section 307(b)(1) is so extreme that it would often prevent parties from obtaining judicial recourse from Agency action or from presenting every available defense in an enforcement suit. The judicial-review provisions necessarily carry with them the coextensive review-preclusion clause of Section 307(b)(2). Taken together as EPA would read them, these provisions would not afford to affected parties " a reasonable opportunity to be heard" as the due process clause of the fifth amendment to the Constittuion requires. *Yakus* v. *United States*, 321 U.S. 414, 433 (1944). The broad range of matters involving particular facilities or minor events which would be made subject to Section 307(b) by EPA's reading would not as a practical matter be carried by aggrieved parties to courts of appeals for review, even though no other opportunity for judicial oversight of the Agency's action would be available and review-preclusion would bar later defenses.

ARGUMENT

Introduction

EPA, PPG, and Conoco all agree that EPA's determinations in the letters of June and August 1977 are "final action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(13). See EPA's Br. at 12-16. As such, EPA's action is subject to judicial review.[16]

[16] PPG and Conoco have never disputed the finality of EPA's action. Curiously, however, EPA takes up four full pages of its brief in arguing the "plain meaning" of "final action" in Section 307(b)(1). These arguments avoid rather than address the disputed portion of the statute. The question is not whether EPA's action here is "final" under traditional concepts of administrative law, but rather whether it is within the "*other* final action" contemplated by Congress in amending Section 307(b)(1).

Unless a special statutory provision prescribes the form of and terms for review, the Administrative Procedure Act [17] and the federal-question jurisdictional statute [18] provide the substantive and jurisdictional predicates for judicial review in federal district court. See, *e.g.*, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967).

There was no doubt prior to the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 776, that jurisdiction to review EPA's action in determining whether its new source standards were applicable to a particular facility would have rested with district courts. Such determinations were not among the actions specifically enumerated in Section 307(b)(1) as being reviewable exclusively in the courts of appeals. See *Utah Power & Light Co.* v. *Environmental Protection Agency*, 553 F.2d 215 (D.C. Cir. 1977) (Leventhal, J.); cf. *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F.2d 904, 910 & n.59 (D.C. Cir. 1979) (ruling on jurisdiction to review actions under the Noise Control Act of 1972; that Act's review provisions are modeled on those of the Clean Air Act) (Robinson, J.). EPA urges that revisions to Section 307 made in the 1977 Amendments require a different result than that reached under the law as it stood prior to the Amendments.

The initial question in this case is thus whether the special review provisions in Section 307(b)(1) of the Act apply to EPA's determinations regarding the application of its regulations to particular facilities such as PPG's waste-heat boilers. Because EPA's action here is not among those listed with specificity in Section 307(b)(1), the action must be within the reach of the "other final action" phrase in order for the court of ap-

[17] 5 U.S.C. §§ 701-706.

[18] 28 U.S.C. § 1331(a). See *Califano* v. *Sanders*, 430 U.S. 99 (1977).

peals to have original and exclusive jurisdiction. Based upon an analysis of (1) the judicial review provisions in Sections 307 and 206 of the Act,[19] (2) the legislative history of these provisions, and (3) the reasoning of decisions of courts of appeals construing these provisions and comparable portions of other environmental regulatory acts, this Court should conclude that the special review provisions do not apply here and that review initially is to take place in the district courts rather than in the courts of appeals.

The coverage and scope of the special review provisions in Section 307(b)(1) are affected strongly by the coextensive review-preclusion language in Section 307(b)(2) of the Act. If this Court should construe the judicial-review provisions sufficiently expansively to embrace EPA's very informal determinations in the present case, then the Court must address the further question of whether the review provisions, given the accompanying review-preclusion language, contravene the due process clause of the fifth amendment.

I. JUDICIAL REVIEW OF EPA'S DETERMINATION THAT NEW SOURCE STANDARDS APPLY TO PPG'S WASTE-HEAT BOILERS IS NOT GOVERNED BY THE SPECIAL PROVISIONS OF SECTION 307(b)(1) OF THE ACT.

This Court has observed that statutes creating special review procedures "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok* v. *Immigration & Naturalization Service*, 392 U.S. 206, 212 (1968). Application of this principle in the present case is made difficult by the inelegant way in which Congress has ex-

[19] Section 206 of the Act is codified at 42 U.S.C. § 7525. The special judicial review provisions of this Section are set out *infra*, at 22-23.

pressed itself and by EPA's singular focus on two phrases in the Act while ignoring completely other pertinent statutory provisions. This Court thus is faced with the task of adopting the construction of the special judicial-review provisions of Section 307(b)(1) which best reconciles potentially contradictory provisions.

A. The Statutory Language Regarding Judicial Review Is On Its Face Ambiguous and Potentially Contradictory.

The special judicial-review provisions of Sections 307 and 206 are ambiguous and open to a construction which introduces a conflict among them. Construed as EPA argues, Section 307 would nullify entirely the review provisions of Section 206. EPA would also have the general "other final action" phrase of Section 307 pull back within its coverage those actions specifically excepted by explicit parenthetical language in the Section. EPA's opening brief fails even to mention these ambiguities and potential contradictions.[20] The Court accordingly must exercise great care in construing the judicial review provisions to arrive at a reasoned interpretation of a poorly drawn statute.

The special judicial review provisions are chiefly found in Section 307. The provisions in Section 307 prescribing the scope and terms of review in courts of appeals are the first, second, and fourth sentences of paragraph 307(b)(1). In the following quotation, the language added by the 1977 Amendments is italicized, and that added by the subsequent Clean Air Act Technical and Conforming Amendments, Pub. L. No. 95-190, § 14(a)(79), (80), 91 Stat. 1404 (November 16, 1977), is shown in bolder type:

> (b)(1) A petition for review of action of the Administrator in promulgating any national primary

[20] EPA's brief does not cite Section 206 in any respect whatsoever.

> or secondary ambient air quality standard, any emission standard **or requirement** under section 112, any standard of performance **or requirement** under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, any standard under section 231, *any rule issued under section* **113, 119 or** *120*, **or** *any other nationally applicable regulations promulgated, or final action taken*, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), *any order* **under section 111(j), under section 112(c), under section 113(d), under section 119, or** *under section 120*, or his action under section 119(c)(2)(A), (B), or (C) **(as in effect before the date of enactment of the Clean Air Act Amendments of 1977)** or under regulations thereunder, *or any other final action of the Administrator under this Act* **(including any denial or disapproval by the Administrator under title I)** *which is locally or regionally applicable* may be filed only in the United States Court of Appeals for the appropriate circuit. . . . Any petition *for review under this subsection* shall be filed within *sixty* days from the date *notice* of such promulgation, approval, or action *appears in the Federal Register*. . . .

When all provisions of paragraph 307(b)(1) are construed broadly, in accordance with EPA's contentions, the paragraph seems to turn itself inside out. The first sentence calls for review in the D.C. Circuit of "any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1))", yet EPA reads the language of "any other nationally applicable regulations promulgated, or final action taken" to bring the

parenthetically excluded standard-setting action of Section 202(b)(1) back into the reach of the sentence.

In all events, standing alone, the "any other . . . final action" clauses of both the first and second sentences are ambiguous. Section 307(b) does not specify whether the "other final action" being addressed has to be similar in nature to those actions specified with particularity.[21] Nor does it speak to whether the "other" action can be rule-making, adjudication, or both, or action taken upon an administrative record, or taken informally without recourse to a contemporaneously compiled record, or both.

Then too, subsection 307(e) provides:

> (e) *Nothing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section.*[22]

Subsection (e) is difficult to parse because it contains three cross-references respectively to "this Act," "this Act," and "this section." Arguably, it could be read to provide that of the provisions in the Act, only those in Section 307 can provide a basis for judicial review of regulations or orders of EPA issued under the Act. But see *infra*, at 42-43 n.40. Yet, Section 206(b)(2)(B)(ii) sets out a further specific provision for judicial review:

> (ii) In any case of actual controversy as to the validity of any determination under clause (i) [regarding whether proper tests were conducted to determine compliance with a manufacturer's certificate of conformity with motor-vehicle emission requirements], the manufacturer may at any time prior to the 60th day after such determination is made file a petition with the United States court of appeals for the circuit wherein such manufacturer resides or has his principal place of business for a judicial review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Administrator or other officer designated by him for that purpose. The Administrator thereupon shall file in the court the record of the proceedings on which the Administrator based his determination, as provided in Section 2112 of title 28 of the United States Code.

[21] Both the legislative history and canons of statutory construction do bear on this question. See *infra*, at 24-40, 42, and 50.

[22] This text is italicized because the subsection was added by the 1977 Amendment. The legislative history of Subsection (e) is described, *infra*, at 42-43 n.40.

Moreover, as an additional matter, the special judicial-review provisions of Section 206(b)(2)(B)(ii) could conflict with those of Section 307(b)(1), depending upon the scope to be given to "other" actions under the latter section.

Looming over all of these statutory provisions is Section 307(b)(2), which precludes any subsequent review of an action which was or could have been reviewed under Section 307(b)(1). This harsh review-preclusion provision provides in its entirety:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

Judge Leventhal's opinion for the court in *Utah Power & Light Co.* v. *Environmental Protection Agency, supra,* gave the review-preclusion provision considerable weight in adjudging the sweep of Section 307(b)(1). 553 F.2d at 218 n.14, 219 & nn.18 & 20. Cf. *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F.2d 904, 912-914 & nn. 75-90 (D.C. Cir. 1979).

Because Section 307 is ambiguous and, on EPA's reading, contradictory, the inquiry must turn to Congress' intent in enacting the Section.

B. The Legislative History Of Section 307(b)(1) Evidences A Congressional Intent To Mandate Special Review In Courts Of Appeals Only For Action Under The Act Where A Definite And Contemporaneously Compiled Administrative Record Would Provide A Ready Basis For Review.

1. *The judicial-review provisions of the Clean Air Amendments of 1970.*

Section 307(b)(1) had its genesis in the Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1676, 1707. Congress then established the basic statutory framework for Section 307(b)(1). As enacted in 1970, the second sentence of Section 307(b)(1) provided exclusive jurisdiction in the appropriate court of appeals for review of agency action taken under two sections of the Act, Sections 110 and 111(d), 42 U.S.C. §§ 1857c-5, 1857c-6(d) (1976). According to the Conference Report, Section 307(b)(1) was inserted by the Senate in its bill[23] to "specify forums for judicial review of *certain* actions of the [EPA]." H.R. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970), *reprinted in A Legislative History of the Clean Air Amendments of 1970*, at 151, 207 (1974) (emphasis added). The conference committee also noted that the House bill did not contain a comparable provision. *Id.*

The Senate debate on S. 4358 indicates that the judicial-review provision contemplated appellate court review of those administrative actions taken after development of a contemporaneous administrative record containing all technical and other relevant information:

> I prefer the judicial review framework in the bill for I believe that *through the administrative process the [EPA] can develop on the record all of the technical and other relevant information necessary to achieve a sound judgment.* Similarly, and in accordance with general administrative law, *such decision of the [EPA], should be reviewable in the court of appeals* so that the interests of all parties can be fully protected. *With the record developed by the [EPA], the court, as an unbiased, independent institution, is the appropriate forum for reviewing such decision and making a judgment as to its quality.* The normal rules of the court also provide the greatest amount of insulation from the political pressures that will undoubtedly surround a judgment of this type. At the same time, judicial review provides for full procedural and substantive due process for all interested parties. I therefore recommend to the Senate that the provision in the bill be retained.
>
> I think the Committee on Public Works is to be commended for accompanying the stringent substantive provision regarding the air pollution control program with several procedural requirements and opportunities to clearly incorporate due process protection in the application of the proposed law. In three areas provision is made to seek relief from, or review of, administrative actions or the application of the statute. The first of these is a general judicial review provision so that administrative promulgations and decisions made pursuant to the [A]ct may be reviewed while maintaining the basic integrity of the [A]ct. In section 308 the committee recognizes that administrative actions will affect the interests of persons and that such actions should, [t]herefore, be reviewable.
>
> (116 Cong. Rec. 33117 (1970) (remarks of Senator Cooper), *reprinted* in Senate Comm. on Public Works, 93rd Cong., 2d Sess., *A Legislative History of the Clean Air Amendments of 1970*, at 285, 386 (1974) (emphasis added).)

The sections of the Act enumerated in the first and second sentences of Section 307(b)(1) required notice and an opportunity for public hearing before EPA could

[23] S. 4358, 91st Cong., 2d Sess., § 308 (1970).

take the action which would be subject to initial review in courts of appeals. See, e.g., Sections 110 and 111(d) of the then-extant Act, 42 U.S.C. §§ 1857c-5 and 1857c-6 (d) (1976). Moreover, agency action taken pursuant to these sections was subject to the Administrative Procedure Act, 5 U.S.C. § 553, and an administrative record was required to be developed on a contemporaneous basis. Thus, the Senate in adopting the judicial-review provision ensured that each section specifically enumerated in Section 307(b)(1) was one under which EPA's actions would be taken only following the development of a comprehensive administrative record.[24] This interpretation of

[24] The Senate Report accompanying S. 4358 also evinces an intent to provide judicial review in courts of appeals for actions taken on the basis of an explicit administrative record:

> One of the uncertainties in the existing Clean Air Act is the availability or opportunity for judicial review *of administratively developed and promulgated standards and regulations.* Moreover, the effect on the general program of a review itself is not clear.
>
> . . .
>
> The Committee does not intend by this language to provide a statutory provision that establishes administrative promulgations or decisions as conclusive and thereby effectively extinguishing the right of review. Rather, the presumption of correctness established is rebuttable by proof that the administrative promulgation or decision is not supported by a preponderance of its evidence. *It should also be noted that evidence regarding any exclusion or omission of relevant material from the administrative record may be adduced to challenge the sufficiency of the administrative record.*

(S. Rep. No. 91-1196, 91st Cong., 2d Sess. 40-41 (1970) *reprinted in* Senate Comm. on Public Works, 93rd Cong., 2d Sess., *A Legislative History of The Clean Air Amendments of 1970,* at 397, 440-41 (1974) (emphasis added).)

The language in the Senate report is premised on the assumption that the courts of appeals are the appropriate forums for review because a comprehensive record would be made available to them. Where such a record was available, there would be little need for further fact-finding or discovery to prove out the basis for the Agency's action, in contrast to the need for such steps where more informally taken administrative action was at issue.

Congressional intent would be consistent with the customary role of the courts of appeals in reviewing actions where factual issues had been resolved by the Agency on a contemporaneously compiled administrative record.

2. *The revision made by the Clean Air Act Amendments of 1977.*

The 1977 Amendments made two additions to the limited number of specified actions of the Administrator which are subject to initial review in the U.S. Court of Appeals for the D.C. Circuit.[25] In addition, they incorporated a reference in the first sentence of Section 307(b)(1) to "any other nationally applicable regulations, or final action taken, by the Administrator". Pub. L. No. 95-95, § 305(c)(1), 91 Stat. 776 (August 7, 1977). A similar reference was added to the second sentence of Section 307(b)(1) regarding review of locally or regionally applicable actions in the "appropriate" circuit. Pub. L. No. 95-95, § 305(c)(2), 91 Stat. 776 (August 7, 1977).

The legislative history for the addition of these phrases contains no suggestion that Congress desired to divest the district courts of any jurisdiction and to transfer jurisdiction instead to courts of appeals. Certainly nothing supports a broad or expansive reading of these clauses. While EPA avoids most of the legislative history, recourse to the language of the phrases standing alone could be read to refer to (1) only the actions under the specifically enumerated sections, or (2) actions of the Administrator taken under the enumerated sections, where he chose to give notice in the *Federal Register*, or (3) actions under the enumerated sections, plus indis-

[25] In the 1977 Amendments Congress added a reference to Section 120 of the Act, 42 U.S.C. § 7420, both to the first sentence of Section 307(b)(1) and to the second sentence of that Section. See EPA's Br. at 22 n.17 (second paragraph).

pensable review of other closely allied actions, or (4) actions under the enumerated sections plus actions beyond those covered by those sections where the action taken was analogous to that taken under the sections listed with particularity, or (5) *all* actions of whatever nature taken by the Administrator, even if not specifically listed or covered by analogy with an enumerated provision, whether or not he chose to give notice of the action in the *Federal Register*. Each of these interpretations, plus others, is conceivable under the language of the clauses. However, only optional interpretations (2), (3), and (4) above represent constructions of the phrases which can be reconciled with other judicial review provisions of the Section and the Act. Other optional interpretations, such as EPA's proffered interpretation (5) above, introduce conflict and contradiction into the statutory terms.

The legislative history conflicts with EPA's proffered extreme interpretation of Section 307(b)(1), *i.e.*, interpretation number (5) above. It is very unlikely that Congress would expand so radically the jurisdiction of the courts of appeals, and divest the district courts of jurisdiction, without some consideration and discussion in the legislative history.[26] More importantly, the only

[26] EPA attempts to generate a legislative history which supports its interpretation of Section 307(b)(1). In support of its argument, EPA relies upon an ill-fated judicial review provision in a 1976 House Committee bill, H.R. 10498, 94th Cong. 2d Sess. (1976). *See* EPA's Br. at 17. EPA invites the Court to infer that Congress subsequently abandoned the approach of specifying with particularity actions to be reviewed in courts of appeals. EPA posits that by adding the "other final action" clauses to Section 307(b)(1) as part of the Clean Air Act Amendments of 1977, Congress intended that *all* actions be reviewable in the courts of appeals. EPA's reliance on the 1976 House bill reaches much too far and obfuscates the history of Section 307(b)(1).

In H.R. 10498, the House Committee did attempt to add specifically enumerated items to the list of reviewable actions in Section 307(b)(1). EPA fails to point out that the bill passed in 1976 by the Senate had no comparable provision and that the judicial review

discussion of the amendment to Section 307(b)(1) adopted in 1977, found in the Report of the House Committee on Interstate and Foreign Commerce,[27] states that the Amendments were "intended to clarify some questions relating to *venue* for review of rules or orders under the [A]ct". H.R. Rep. No. 95-294, 95th Cong., 1st Sess., at 323, *reprinted in* [1977] U.S. Code Cong. & Ad. News 1077, 1402 (emphasis added). The complete text of the pertinent comments in the House report is as follows (the footnotes have been retained):[28]

> Subsection (c) of section 305 of the bill is *intended to clarify some questions relating to venue* for review of rules or orders under the act. Paragraph (1) of that subsection makes it clear that any nationally applicable regulations promulgated by the Administrator under the Clean Air Act could be reviewed only in the U.S. Court of Appeals for the District of Columbia. These would include, to mention but a few examples, regulations to carry out the nonattainment policy referred to in section 117 of this bill and regulations to effectuate motor vehicle assembly-line test provisions of section 206 of the act

provision of the House bill failed to survive consideration by the conference of differences in the 1976 House- and Senate-passed versions. *See* H.R. (Conf.) Rep. No. 94-1742, 94th Cong. 2d Sess. at 124-25 (1976). The Conference Committee gave no explanation for its deletion. *Id.* The 1976 bill then was not enacted by Congress. EPA espouses mere speculation in trying to read anything into this abortive legislative history.

[27] This amendatory language originated in the House. The explanatory portions of the Conference Report contain no reference to adoption of these provisions from the House bill. H.R. (Conf.) Rep. No. 95-564, 95th Cong. 1st Sess., at 177-178 (Conference Report), *reprinted in* [1977] U.S. Code Cong. & Ad. News, 1502, 1558-1559.

[28] EPA has presented a distorted picture of the House Committee's intent by omitting in the quotation in EPA's Br. at 20 all those parts of the House Report which make clear that this portion refers to venue rather than jurisdiction, *i.e.*, the first sentence of the first paragraph and the third, fourth, fifth, and sixth paragraphs of the pertinent material.

or inspection/maintenance requirements under section 208 of this bill.

Subsection (c)(2) of section 305 provides for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court of appeals for the circuit in which such locality[,] State, or region is located. This provision applies, except as otherwise provided in paragraph (4), to the Administrator's action in approving or promulgating an implementation plan for any State.

On the other hand, if an action of the Administrator is found by him to be based on a determination of nationwide scope or effect (including a determination which has scope or effect beyond a single judicial circuit), then exclusive *venue* for review is in the U.S. Court of Appeals for the District of Columbia, under paragraph (4).

In adopting this subsection, the committee was in large measure approving the portion of the Administrative Conference of the United States recomendation section 305.76-4(A), that deals with venue.[10] The commitee's view also concurs, however, with the comments, concerns, and recommendation contained in item No. 1 of the separate statement of G. William Frick, which accompanied the Administrative Conference's views.[11]

Also, as indicated earlier, the committee bill incorporates recommendation D2 of the Administrative Conference on extending the period for petitoning for judicial review in the court of appeals.

However, in no event should these provisions be construed as endorsement of the remainder of the Administrative Conference's recommendations. Some of these recommendations, such as those contained in items B and C, were simply not considered by the committee. Others (such as the recommendations in D1 and D3[)] were rejected.[12]

[10] See 41 Fed. Reg. 56767-69 (December 30, 1976).

[11] *Id.* at 56768.

[12] See supra [sic] in this section for a discussion of the committee's views on item D3. On recommendation D3, largely for the reasons stated in the separate statement of G. William Frick, the committee oposed [sic] the Conference's recommendation. See also *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d [349] (3d Cir. 1972) [,(*cert. denied*, 409 U.S. 1125 (1973)]; *Lloyd A. Fry Roofing Co.* v. *EPA*, 415 F. Supp. 799 (W.D. Mo. 1976) [,*aff'd*, 554 F.2d 885 (8th Cir. 1977)].

(*Id.* at 323-324, [1977] U.S. Code Cong. & Ad. News, at 1402-1403) (emphasis added).)

The House report thus discusses the amendments to Section 307(b) as *venue* provisions. The Report addresses allocating review of administrative actions having only local or regional impact to the circuit where the impact is felt, while relegating review of administrative actions of nationwide scope or effect to the District of Columbia Circuit. This overriding concern is reinforced by the reference in the Report to "the portion of the Administrative Conference of the United States recommendation section 305.76-4(A), that deals with venue." *Id.* at 324, [1977] U.S. Code Cong. & Ad. News, at 1403 (footnote omitted).

The Administrative Conference of the United States recognized the distinction between the venue and jurisdiction provisions of Section 307(b)(1). Its recommendations completely severed the two. While Recommendation A was titled "Venue in the Courts of Appeals," Recommendation E was titled "Actions Subject to Court-of-Appeals Review" and proposed expanding the jurisdiction of the courts of appeals to include several additional specific agency actions which were reviewable in district courts. See 41 *Fed. Reg.* at 56768. Recom-

mendation A of the Administrative Conference, which is set out at 41 *Fed. Reg.* 56768 (December 30, 1976),[29] provides in pertinent part as follows:

> 3. Congress should amend section 307(b) of the Clean Air Act [42 U.S.C. § 1857h-5(b)] to make explicit that the Administrator's action in approving or promulgating state implementation plans is reviewable in the circuit containing the state whose plan is challenged. (Brackets in the original.)

Recommendation E on the other hand dealt specifically with a transfer of initial-review jurisdiction from district courts to courts of appeals. However, the House report expressly disavowed any endorsement of the Administrative Conference's recommendations other than Recommendation A. See *supra*, at 30-31 (quoted text accompanying n.12 of quote). Thus, Congress did not intend or attempt to expand the jurisdiction of the courts of appeals provided by the Act.[30]

Notably, the House Report mentions specifically that "[s]ome of these [the Administrative Conference's] recommendations, such as those contained in items B and C,

[29] The complete text of the Administrative Conference's recommendations is reprinted, *infra*, at Appendix B to this brief.

[30] Congressional selectivity in the approval of the Administrative Conference's recommendations was made evident by the contemporaneous deliberations on the Federal Water Pollution Control Act Amendments of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (the "Clean Water Act"). Among the *venue* recommendations of the Administrative Conference was the proposal to amend Section 509(b) of the Clean Water Act, 33 U.S.C. § 1369(b) to provide for centralized review of all national standards under the Clean Water Act in the Court of Appeals for the District of Columbia Circuit. 41 Fed. Reg. 56767, 56768 (December 30, 1976). Such an amendment was proposed by Senator Kennedy during the Senate's floor debate on the Clean Water Act of 1977. 123 Cong. Rec. S13598-13605 (daily ed. August 4, 1977). Despite the Administrative Conference's recommendation, the Senate declined by a substantial margin (59-36) to adopt the amendment. *Id.* at 13604, 13605.

were simply not considered by the [House] committee." *Id.* Recommendation B is captioned "Choice between District Court and Court of Appeals for Review", and Recommendation C is captioned "Limitation of Non-Statutory Review." (1 C.F.R. § 305.76-4, Recommendations B, C; Appendix B, *infra*, at 8a-9a.)

Moreover in Recommendation E, the Administrative Conference made one explicit suggestion for a change in the actions subject to review in courts of appeals under Section 307(b)(1). Recommendation E.2 proposed a revision of Section 307(b)(1) to shift review jurisdiction from district courts to courts of appeals for new-car emission standards only:

> 2. Congress should amend the Clean Air Act to make those new-car emission standards not now reviewable under section 307(b) [42 U.S.C. § 1857h-5(b)], reviewable in the courts of appeals.
>
> (1 C.F.R. § 305.76-4, Recommendation E.2.; Appendix B, *infra* at 10a (brackets in original).)

Recommendation E.2. was among those which the House Committee said it had not considered. See *supra*, at 30-31. The Recommendation refers to the parenthetical exclusion in Section 307(b)(1) (first sentence), which provides for review in the D.C. Circuit of "any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1))". Congress left this language intact in 1977. The resulting potential inconsistency in the Section, which would arise with adoption of EPA's expansive construction of the "other final action" clause, has been discussed *supra*, at 20-23.

The intent of the Administrative Conference is unmistakable. Professor Currie had prepared a report for the Conference which served as the basis for comments by interested persons and then for the deliberations of

the Conference itself. His report has been reprinted as an article in the *Iowa Law Review*: Currie, *Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221, 1225 n.37 (1977). The report contains a section specifically addressing the parenthetical exclusion in Section 307(b)(1) for a "standard required to be prescribed under section 202(b)(1)."[31] See *id.* at 1228-1229. Professor Currie observed that:

> Two alternative inferences may be drawn from this exception, since it clearly is not an accident: that the excepted standards are reviewable under general federal law in the district courts, or that they are not reviewable at all.

(*Id.* at 1228.)

Upon analysis, Professor Currie determined that there were several areas of possible dispute regarding the excepted emission standards. Because of the constitutional implications of completely precluding review, and because Congress had not shown the requisite clear and convincing intent to block judicial review of the potential disputes, he concluded that review in the federal district courts under general federal law was available for the excepted standard-setting action. *Id.* at 1228-1229. Nonetheless, he saw no apparent reason why review should take place in district courts rather than the circuit courts. *Id.* at 1228. The Administrative Conference obviously agreed. Despite these urgings Congress did not act to remove the exception.

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[31] Section 202(b)(1) then as now called on EPA to prescribe emission standards for hydrocarbons, carbon monoxide, and nitrogen oxides from "light-duty vehicles".

The 1977 Amendments added language to Section 202(b)(1) requiring EPA also to prescribe (1) substitute emission standards for NO_x applicable to cars built by small manufacturers, and (2) test-procedure regulations for measuring evaporative emissions of hydrocarbons. See *infra*, at 41.

A slightly different situation is presented by two provisions of the Clean Air Act which, prior to the 1977 Amendments, had provided an express and explicit mechanism for judicial review, separate and apart from Section 307(b)(1). The first of these provisions was in Section 110(f) of the then-extant Act, 42 U.S.C. § 1857c-5(f)(B) (1976), which provided for review of determinations respecting state applications for postponement of implementation plan requirements in "the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person." The House initiated changes to Section 110(f)[32] which among other things deleted the special review provision.[33] No explanation was offered for making the deletion. The changes, including the deletion, were adopted as part of the 1977 Amendments. The special review provision previously in Section 110(f) of the Act consequently has been removed.

The other special review provision was (and still is) found in Section 206(b)(2)(B)(ii), 42 U.S.C. § 7525(b)(2)(B)(ii). This provision, like that previously in Section 110(f), was added by the 1970 Amendments to the Act. It authorizes review of determinations respecting suspension or revocation of motor vehicle compliance certificates upon petition by "the manufacturer" in "the

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[32] The Section is now codified at 42 U.S.C. § 7410(f).

[33] The pertinent portion of the 1977 Amendments is found at Pub. L. No. 95-95, §§ 107, 108, 91 Stat. 691, 693 (1977).

These amendments to Section 110(f) originated in H.R. 6161, § 115, 95th Cong. 1st Sess. (1977). Neither the discussions of this provision in the House Committee Report, H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 12-13, 202-03 (1977), nor in the Conference Report, H.R. (Conf.) Rep. No. 95-564, 95th Cong. 1st Sess. 125 (1977), disclose the reasons for deleting the special judicial review provision previously in Section 110(f).

United States court of appeals for the circuit wherein such manufacturer resides or has his principal place of business" in "any case of actual controversy as to the validity of [such] determination."[34] Congress did not amend this provision in any respect in 1977. It left it intact. Congress presumably was aware of this provision when it adopted the 1977 Amendments,[35] and nowhere in the legislative history is there any suggestion that the review contemplated by Section 206(b)(2)(B)(ii) is in any respect inconsistent with that prescribed in Section 307(b)(1).

Finally, the preamble to the Administrative Conference's recommendations noted that the actions reviewable by courts of appeals under Section 307(b)(1) had certain common characteristics:

> Not every action of the EPA under the Clean Air Act . . . is made reviewable in the courts of appeals. *Some of the omissions* appear to be inconsistent with *the general statutory plan*, and corrective amendments are desirable.
>
> (41 Fed. Reg. at 56768 (emphasis added).)

Substantively, the Administrative Conference was, of course, referring to Recommendation E, which was not adopted by Congress. Nonetheless, the Conference recognized the existence of a "general statutory plan". It also pointed to one common characteristic, shared by each section enumerated in Section 307(b)(1) (pre-1977 Amendments) as to which review was to be had in courts of

[34] The full text of this provision is set out *supra*, at 22-23.

[35] Professor Currie had noted the existence of review provisions in Sections 110(f) and 206(b)(2)(B)(ii) in his report for the Administrative Conference. See 62 Lowa L. Rev. at 1223 n.31. Congress seemingly had Professor Currie's report available to it, because the House Committee specifically referred to then-EPA General Counsel Frick's comments on the report and the Administrative Conference's action. See *supra*, at 30.

appeals. That common element was that each of the specified actions of the Administrator had to be taken in compliance with the Administrative Procedure Act and thus would have been taken upon a complete and contemporaneously compiled administrative record.[36]

In the 1977 Amendments, Congress made changes in Section 307 which emphasized its insistence upon a definite and contemporaneously compiled record to support particular rulemaking actions by EPA. A new Section was added which established procedural requirements for the actions explicitly enumerated in Section 307(d)(1)(A)-(M). The procedural requirements set out in Section 307(d) are more stringent than, and displace, those of the Administrative Procedure Act.[37] As one might ex-

[36] This was so except for the then-existing reference to Section 119(c)(2)(A), (B), and (C). See 42 U.S.C. § 1857h-5(b) (1976), referring to 42 U.S.C. §§ 1857c-10(c)(2)(A), (B), and (C).

[37] In a recent decision, the D.C. Circuit explained the new requirements as follows:

> The purpose of the amendments [adding Section 307(d)] was to facilitate judicial review by defining "what the record for a rule consists of, and how and when material must be placed in the record." H.R. Rep. No. 294, 95th Cong., 1st Sess. 318, 319 (1977). The statute requires the inclusion of some materials, and the exclusion of others, so that the record for judicial review will comprise only those materials directly pertinent to the agency's decision. In summary, it requires the EPA to compile a docket on or before the date a proposed rule is published in the Federal Register. The materials in the docket must be open to public inspection until the final rule is promulgated, and with one exception, they become the record for judicial review after such promulgation. The docket must include the proposed rule, a statement of its basis and purpose (including a summary of the factual data on which the proposed rule is based, the methodology used with the respect to those data, and the major legal interpretations and policy considerations underlying the rule), all comments written by the public and submitted during the comment period, a transcript of any public hearing on the proposed rule, the text of the final rule, a statement of the basis and purposes of the final rule, an explanation of major changes from the proposed rule, and a

pect, a number of the rulemaking actions specified for special judicial review in the first sentence of Section 307 (b) (1) are also specified for particular administrative procedures in Section 307 (d) (1).

Accordingly, in the 1977 Amendments Congress built on and confirmed its intent expressed in connection with the 1970 Amendments that judicial review in courts of appeals take place on a definite and contemporaneously compiled administrative record. Congress in 1977 added Section 307 (d) to place on EPA the obligation to base certain of its decisions upon just such a record. Of greatest importance here is the fact that Congress expressed *no intent* to expand the scope of Section 307 (b) (1) to transfer to courts of appeals review of actions other than those taken by EPA within the bounds of a definite record.

3. *The consequent technical amendments adopted in November 1977.*

The Clean Air Act Technical and Conforming Amendments of 1977, Pub. L. No. 95-190, § 14, 91 Stat. 1393, 1399, made a number of further revisions to the Clean Air Act. Included in these technical amendments was the addition of several enumerated sections to both the first and second sentences of Section 307 (b) (1).[38] The legislative history behind these technical amendments is sparse. A Summary and Statement of Intent was inserted in the Congressional Record, and in pertinent part states that Congress was adding provisions calling for review in courts of appeals of particular actions:

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response to every major comment, criticism, and new datum submitted during the comment period.

American Petroleum Institute v. *Costle*, No. 79-1104, slip opinion at 4-5 (D.C. Cir. November 6, 1979) (footnote omitted).

[38] Pub. L. No. 95-190, § 14(a)(79) and (80), 91 Stat. at 1404.

> (79) and (80) Implements conference agreement to make clear that judicial review is available for new provisions, as well as old, dealing with hazardous emissions standards and new sources and other requirements and for delayed compliance orders and penalties and smelter orders. Also implements conference agreement providing for review of grant or denial of locally applicable orders in the appropriate circuit court, and review of nationally applicable regulations in the D.C. Circuit Court.
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> (123 Cong. Rec. H. 11,956 (daily ed. November 1, 1977) *reprinted in* [1977] U.S. Code Cong. & Ad. News 3661, 3666.)

Also, on the Senate floor, Senator Byrd of West Virginia offered a statement by Senator Muskie (who was absent from the Senate debate due to illness) which "explain[ed] these amendments." 123 Cong. Rec. S18372 (daily ed. November 1, 1977). In the explanation Senator Muskie assured the Senate that "[it] is not the purpose of these amendments to re-open substantive issues in the Clean Air Act." *Id.* He also stated that only "necessary" technical amendments were being made:

> All of the comments of the Environmental Protection Agency and private citizens have been reviewed by the Committee staff. Many have been rejected because they attempt to raise policy issues. *Only those amendments that are necessary to correct technical errors or unclear phrases have been retained in the package of amendments* that is now before the Senate.
>
> Members of the Environment and Public Works Committee have examined these amendments. If there were any questions about the legitimacy of an amendment, it was dropped from the list. (*Id.* (emphasis added).)

The technical amendments accordingly demonstrate that less than three months after adding the "other final ac-

tion" clauses to Section 307(b)(1), Congress felt compelled to specify several additional sections of the Act in the judicial-review provision. If Congress had intended the "other final action" clause to confer exclusive jurisdiction on the courts of appeals to review every final action of the Administrator, the technical amendments would not have been necessary.

C. EPA's Extreme Interpretation Would Nullify Provisions Of Section 307, As Well As Provisions Of Section 206.

1. *EPA's proffered interpretation would create an internal conflict in the terms of the first sentence of Section 307(b)(1).*

EPA's expansive interpretation of Section 307(b)(1) cannot be correct. It would create an internal conflict in the terms of the first sentence of Section 307(b)(1). As previously discussed, a portion of the first sentence specifies that among the actions explicitly subject to review in the D.C. Circuit is "any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1))." If the "other . . . final action taken" clause in the first sentence of Section 307(b)(1) were interpreted as EPA here asserts, the foregoing parenthetical clause excepting certain standards under Section 202 would be nullified or effectively elided from the statute. The specifically excepted standards would be drawn back within the coverage of the special review provisions by the tag-end general clause. This was definitely not Congress' intent, as illustrated by the House Committee's explicit statement that it was not acting on the Administrative Conference's Recommendation E.2. proposing deletion of the exception from Section 307(b)(1).

EPA has elsewhere tried to evade the logical thrust of Congress' failure to remove the exception by arguing

that the emissions standards issued under Section 202(b)(1) are statutorily established. EPA asserted that its action in actually issuing such standards is only ministerial in nature and need not be subject to any review. Defendant's Reply Brief In Support of Its Motion to Dismiss, at 20, *Rubber Manufacturers Association* v. *Costle*, Civil Action No. 79-189 (D. Del.). This argument is discredited by the contrary analysis in Professor Currie's report to the Administrative Conference, evidently available also to Congress, on this precise point. See *supra*, at 33-34.

Moreover, EPA's argument also is negated by Congress' amendments in 1977 to Section 202(b)(1). In addition to the emission standards previously required to be prescribed under that provision, the 1977 Amendments required EPA to issue two further types of standards under Section 202(b)(1). Subparagraph (b)(1)(B) authorizes the Administrator to issue *substitute* emission standards for oxides of nitrogen for certain small manufacturers, *i.e.*,

> for any light-duty vehicle manufactured during model years 1981 and 1982 by any manufacturer whose production, by corporate identity, for calendar year 1976 was less than three hundred thousand light-duty vehicles if the Administrator [makes certain determinations].

Then also, subparagraph (b)(1)(C) requires EPA to issue regulations providing that the test procedures for "evaporative emissions of hydrocarbons" shall measure emissions "from the vehicle or engine as a whole." [39]

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[39] Like the emission standards, these further standards are also "required to be prescribed" under Section 202(b)(1). Regarding the substitute standards for nitrogen oxides, the statute states expressly that the "Administrator *shall prescribe* [those] standards." Section 202(b)(1)(B) (emphasis added). Regarding the regulations governing test procedures for evaporative emissions,

2. *EPA also asks this court to elide completely Section 206(b)(2)(B)(ii), (iii) and (iv) from the Act.*

The prior discussion shows that under EPA's expansive reading of the two "other final action" clauses of Section 307(b)(1), the special review provisions in Section 206(b)(2)(B)(ii), (iii) and (iv) would be nullified completely. See *supra*, at 22-23. Congress gave no indication whatsoever that it intended such a result. See *supra*, at 35-36. The 1977 technical amendments were designed to deal with such inconsistencies and conflicts created in the Act by the 1977 Amendments. See *supra*, at 38-39. And indeed, Congress amended the review provisions of Section 307(b)(1) to add further enumerated actions without dealing in any way with the separate review provisions of Section 206(b)(2)(B). See *supra*, at 38-40. Senator Muskie's explanatory statement of the technical amendments (quoted *supra*, at 39.), reports that EPA made numerous suggestions for changes, and that the pertinent congressional committees had adopted those changes which were "necessary." *Id.* Repeals by implication are not favored, and this principle of statutory construction carries especial weight when the Court is urged to find that a specific provision such as Section 206(b)(2)(B) has been repealed by more general provisions such as the "other final action" clauses in Section 307(b)(1). *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168-169 (1976). See also *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 189-190 (1978).[40]

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the statute states: "Regulations to carry out this subparagraph [202(b)(1)(C)] *shall be promulgated* not later than two hundred and seventy days after the date of enactment of this subparagraph." Section 202(b)(1)(C) (emphasis added).

[40] EPA, however, essentially mounts a double-barrelled attack on the jurisdictional provision of Section 206(b)(2)(B). In addition to the nullifying effect of its expansive construction of Section 307(b)(1), EPA's proffered interpretation of Section 307(e) would also have the effect of negating Section 206(b)(2)(B). Again, EPA's arguments reach too far. Properly construed, Section 307(e) does not bear on Section 206(b)(2)(B) at all.

Section 307(e) is the portion of the statute which speaks of the authority in the Act for judicial review of EPA's orders and regulations adopted under the Act. See *supra*, at 22. EPA says the subsection "reinforces a congressional intention to place judicial review of all final agency decisions in the courts of appeals." EPA's Br. at 22 n.17. This assertion has utterly no support. The subsection itself does not purport to affect any review measures except those set out in the Act. The basis for review in district courts stems from general statutes (the Administrative Procedure Act and the federal-question jurisdictional statute) which obviously are not part of the Clean Air Act.

Moreover, EPA's assertions based on Subsection 307(e) fail for another equally fundamental reason. Subsection 307(e) was added to the Act by Section 303 of the 1977 Amendments, Pub. L. No. 95-95, § 303(d), 91 Stat. 685, 772. That section of the 1977 Amendments was captioned "Citizen Suits" (*id.* at 771), and chiefly made various revisions to Section 304 of the Act, as amended, 42 U.S.C. § 7604, which authorizes such citizen suits. Section 307(e) of the Act was added by the last provision of Section 303 of the 1977 Amendments. In contrast, the amendments to the judicial review provisions of Section 307(b)(1) of the Act were made by Section 305 of the 1977 Amendments, which section was captioned "Administrative Procedures and Judicial Review." Pub. L. No. 95-95, § 305, 91 Stat. 685, 772-777. Thus, the placement in the Amendments of the provision adding Section 307(e) is very instructive, and shows that Congress was trying to forestall use of citizen suits brought under Section 304 of the Act as an alternative means to obtain judicial review of regulations and orders otherwise subject to review under Section 307(b)(1) of the Act.

Under the Act as it stood prior to the 1977 Amendments, the question had arisen whether there could be concurrent jurisdiction in the court of appeals and the district court when EPA had acted, but where a "citizen" alleged that the action had not gone far enough in an area where EPA was under a statutory duty to act. See, *e.g. Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654, 661 n.9 (D.C. Cir. 1975) (Wright, J.) (suggesting concurrent jurisdiction). See Currie, *Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221, 1247-49 & n.216 (1977). By adopting Section 307(e) of the Act as part of the amendments regarding citizen suits, Congress was rejecting the suggestion in the *Oljato* case and providing that review under the judicial-review provision should oust jurisdiction under the citizen-suit provision.

In sum, as properly construed, Section 307(e) of the Act does not bear on, let alone nullify, the special review provisions separately placed in Section 206(b)(2)(B) of the Act.

D. By Rejecting EPA's Exhortations For An Expansive Reading Of Section 307(b)(1), The Court Of Appeals Construed The Statute In Accord With Decisions By Other Courts Of Appeals.

In putting forward its arguments, EPA notably fails to cite any decisions by the courts of appeals construing judicial-review provisions of this and comparable statutes. The omission is for good reason—the decisions of the courts of appeals uniformly support the reasoning and approach of the Fifth Circuit.

1. The courts of appeals have carefully avoided making any expansive interpretations of the special judicial-review provisions in the Clean Air Act, the Clean Water Act, and the Noise Control Act, despite EPA's efforts.

Courts of appeals have "narrowly" or "strictly construed" the similar judicial-review jurisdictional provisions found in the Clean Air Act, the Clean Water Act, and the Noise Control Act. See, *e.g.*, *Utah Power & Light Co.* v. *Environmental Protection Agency*, 553 F.2d 215, 219 n.19 (D.C. Cir. 1977) (Clean Air Act—construed "narrowly") (Leventhal, J.); *Crown Simpson Pulp Co.* v. *Costle*, 599 F.2d 897, 900 (9th Cir. 1979) (Clean Water Act—"strictly construed") (Duniway, J.), *cert. pending*, No. 79-797; *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F.2d 904, 914 (D.C. Cir. 1979) (adopting a "strictly limited" and "narrow interpretation" of the comparable provision of the Noise Control Act) (Robinson, J.). In these cases, the courts of appeals dismissed petitions for review of actions on the ground that the actions at issue were not covered by the special provisions of the acts calling for review in the courts of appeals.[41]

[41] Judicial review was to be had in district courts under the federal question statute, 28 U.S.C. § 1331(a), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. See *Califano* v. *Sanders*, 430 U.S. 99 (1977); *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607-608 n.6 (1978).

The courts of appeals have cited two particular grounds for narrowly construing judicial-review provisions calling for initial jurisdiction in courts of appeals. First, administrative records of actions taken by an agency on an informal basis can be sketchy or virtually non-existent; they thus provide no effective basis for review. See *Crown Simpson Pulp Co.* v. *Costle*, *supra*, 599 F.2d at 904.[42] Second, the Clean Air Act, the Clean Water Act, and the Noise Control Act all contain review-preclusion provisions which bar any subsequent review of

[42] The court in *Crown Simpson* compared on this ground the prior decision in *Washington* v. *Environmental Protection Agency (Scott Paper)*, 573 F.2d 583 (9th Cir. 1978), with the ruling in *Ford Motor Co.* v. *Environmental Protection Agency*, 567 F.2d 661 (6th Cir. 1977).

Use of the nature of the record available for review as a factor in construing the judicial review provisions of a statute is consistent with a number of decisions by courts of appeals. For example, in *Investment Company Institute* v. *Board of Governors of the Federal Reserve System*, 551 F.2d 1270 (D.C. Cir. 1977), the court of appeals construed the Bank Holding Company Act to provide for review of a rulemaking order under a special judicial-review provision addressed to "orders." *Id.* at 1278. A substantial eight-volume record of informal rulemaking was available. *Id.* The court distinguished *United Gas Pipe Line Co.* v. *Federal Power Commission*, 181 F.2d 796 (D.C. Cir.), *cert. denied*, 340 U.S. 827 (1950), in which the court of appeals refused to review regulations promulgated after informal rulemaking on the ground that the available record did not fully encompass the issues. The *United Gas Pipe Line* decision probably is not viable insofar as it refuses to recognize that *some* administrative record is available even where an agency's decision is *not* required to be based on a definite record. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). But the type of record available for review should be a factor in construing statutory provisions governing *where* (in courts of appeals or district courts) review should be had initially. See Currie and Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 54-61 (1975).

an action by EPA that is reviewable in a court of appeals under the judicial-review provisions of those Acts. These are harsh provisions, and the constitutionality of the provisions is in question as the D.C. Circuit noted in *Chrysler Corp.* v. *Environmental Protection Agency* (the court's footnotes have been included):

> [T]he Supreme Court has suggested that the constitutional validity of the preclusive review provision of the Clean Air Act Amendments merits serious consideration.[80] Although, in *Yakus* v. *United States*[81] the Court sustained the constitutionality of a similar provision in the Emergency Price Control Act of 1942,[82] that holding may be distinguishable on the ground that the *Yakus* provision was a "war emergency measure."[83] *The nagging presence of a substantial due process question indicates, then, at the very least, the propriety of a narrow interpretation of Section 16(a) [the judicial-review provision of the Noise Control Act].*

[80] See *Adamo Wrecking Co.* v. *United States*, *supra* note 59, 434 U.S. at 289, 98 S.Ct. at 575, 54 L.Ed.2d at 551 (concurring opinion) ("[i]f the constitutional validity of § 307(b) of the Clean Air Act had been raised by petitioner, I think it would have merited serious consideration"); see *Utah Power & Light Co.* v. *EPA*, *supra* note 57, 180 U.S. App. D.C. at 74 n.19, 553 F.2d at 219 n.19 ("[r]ecent judicial opinions have tended to construe [the preclusive review provision of the Clean Air Act] narrowly").

[81] 321 U.S. 414, 64 S.Ct. 860, 88 L.Ed. 834 (1944).

[82] § 204, 56 Stat. 23 (1942), 50 U.S.C.App. § 924 (Supp. II[)] (1942), as amended by the Inflation Control Act of 1942, 56 Stat. 765 (1942), 50 U.S.C.App. § 961 *et seq.* (Supp. II[)] (1942).

[83] 434 U.S. at 290, 98 S.Ct. at 575, 54 L.Ed.2d at 551 (concurring opinion).

(600 F.2d at 913 (emphasis added).)

In short, EPA has pressed on a number of courts "an expansive reading" of the jurisdictional provisions of

the Clean Air Act, the Clean Water Act, the Noise Control Act. See *Chrysler Corp.* v. *Environmental Protection Agency*, *supra*, 600 F.2d at 911. Courts have rebuffed these efforts by EPA, even where the private parties also joined the Agency in such jurisdictional contentions. See, *e.g.*, *Crown Simpson Pulp Co.* v. *Costle*, *supra*, 599 F.2d at 900. This Court similarly should reject EPA's argument for the broadest possible interpretation of Section 307(b)(1) (see *supra*, at 27-28), and in doing so, uphold the wisdom and results of a number of years' experience of the courts of appeals with comparable cases.[43]

2. *Other decisions by courts of appeals construing the amended Section 307(b)(1) are consistent with the Fifth Circuit's decision in the present case.*

In the present case the Fifth Circuit attempted to determine what type of action was within the "any other final action" language of the statute by reference to the legislative history of the 1977 amendments. However, the legislative history spoke only of *venue* for review, not jurisdiction. (See 587 F.2d at 243 n.6, Pet. App. 15a-16a.) As the Fifth Circuit observed, the legislative history "complete[ly] fail[s] to mention what EPA asserts was a massive shift in jurisdiction to the courts of appeals." (*Id.* at 243 (footnote omitted), Pet. App. 15a.)[44]

[43] This Court previously has pointed to "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals." *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977).

[44] As a matter of statutory construction, this Court also has presumed that Congress would not make a similarly important change in settled statutory law without stating its intent expressly and in words which could not be misunderstood. See *Takao Ozawa* v. *United States*, 260 U.S. 178, 194 (1922); *Thompson* v. *United States*, 246 U.S. 547, 551 (1918). This is especially true insofar as judicial procedure is concerned. Compare *Mitchum* v. *Foster*,

The court accordingly turned to other aids to statutory construction. It concluded that the amended statutory provisions must be read in light of the limited ability of a court of appeals to develop facts, a limitation recognized by Congress when it framed the Act's judicial-review jurisdiction provisions in 1970.[45] In the court's view the determination regarding jurisdiction should reflect the capability provided a district court to call into play discovery procedures to compile and verify the basis for the Agency's decision where a contemporaneous administrative record had not been maintained.

Other courts of appeals have construed Section 307 (b) (1) in a manner consistent with this ruling. In *United States Steel Corp.* v. *Environmental Protection Agency*, 595 F.2d 207 (5th Cir. 1979), the petitioners filed for review of EPA's action in promulgating regulations designating areas in Alabama as nonattainment areas for suspended particulates. The court found that it had jurisdiction under Section 307(b) (1) of the Act to review the agency action. 595 F.2d at 212. It distinguished this decision from its prior decision in the *PPG* case on the basis of the type of agency action taken and the resulting administrative records involved in each case. The court noted that the record in the *PPG* case consisted solely of exchanged correspondence.[46]

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407 U.S. 225, 236 n.21 (1972), and *Ex Parte Collett*, 337 U.S. 55, 68, 70-71 (1949), with *United States* v. *Sisson*, 399 U.S. 267, 292-293 n.22 (1970).

[45] See the discussion *supra*, at 45 n.42, regarding the nature of the record available for review as a useful factor in construing the special judicial-review provisions of a statute.

[46] Because there was a substantial record in the *U.S. Steel* case, derived from a rulemaking proceeding, the court found that the considerations that gave rise to the result in the *PPG* case were absent. 595 F.2d at 212. The court explicitly acknowledged the difference in the nature of the two actions. In the *PPG* case EPA had determined that a certain regulation was applicable to a specific plant, while in the *U.S. Steel* case EPA had promulgated regulations having a general effect in the specified areas. *Id.*

Similarly, in *Sharon Steel Corp.* v. *Environmental Protection Agency*, 597 F.2d 377 (3d Cir. 1979), steel-company petitioners sought review of a final rule issued by EPA embodying the determination that four areas of Pennsylvania were nonattainment areas for suspended particulates. The Third Circuit briefly discussed the jurisdictional issue, and in doing so, distinguished the case before it from the Fifth Circuit's prior decision in the *PPG* case on grounds similar to those set out in the Fifth Circuit's *U.S. Steel* decision. See 597 F.2d at 379 n.3. The Third Circuit took the position that the *PPG* case was not applicable in the case before it because EPA in its case had taken action which the Agency had denominated as rulemaking subject to 5 U.S.C. § 553. The court opined that the *PPG* case stood for the proposition that Section 307(b) did not give jurisdiction to courts of appeals to review the interpretation and application of regulations, where the Agency was acting on an informal basis. *Id.*

Consequently, in the three cases reported to date interpreting the "other . . . final action" clause of Section 307(b) (1), the courts of appeals have reached decisions which provide a reasoned and practical conceptual basis for deciding which of the many types of "other actions" are properly to be reviewed in courts of appeals and which are to be reviewed in district courts. If an action taken by EPA was necessarily based upon a record provided by an adjudicatory or a rulemaking proceeding, then the action would be reviewed in the courts of appeals. If the action reflects informal proceedings not taken on the basis of a contemporaneously compiled administrative record, such as the informal adjudication in the present case, then district courts must undertake the task of review. This is precisely the result advocated as a general matter by two distinguished commentators. See Currie and Goodman, *Judicial Review Of Federal*

Administrative Action: Quest For The Optimum Forum, 75 Colum. L. Rev. 1, 54-61 (1975).

Such a construction of the "other final action" clause would give effect to Congress' intent in adopting the special judicial-review provisions as part of the 1970 Amendments to the Act. See *supra*, at 24-27. The actions listed with specificity in Section 307(b)(1), and thus specially subject to review in the courts of appeals, all must be based on administrative proceedings reflecting at least notice and an opportunity for hearing. See *supra*, at 26 & n.24, 37 & n.36, and *infra*, at 53 & n.48. The only arguable exception relates to action under Section 112(c) regarding hazardous pollutants (see *infra*, at 53 & n.48), which was added to the list by Congress without explanation as part of the 1977 technical amendments. See *supra*, at 20-21, 38. In the circumstances, the rule of *ejusdem generis* should be applied to limit the general "other final action" phrase to reach only matters similar to those covered by the preceding specifically enumerated references. Application of the rule of *ejusdem generis* here would serve Congress' intent in enacting Section 307(b)(1) to provide a special route for judicial review in courts of appeals for enumerated actions taken on a contemporaneously compiled administrative record. See *Fitch Co.* v. *United States*, 323 U.S. 582, 585-586 (1945); *Smith* v. *Davis*, 323 U.S. 111, 116-117 (1944); *United States* v. *Salen*, 235 U.S. 237, 249 (1914); *United Steves* v. *Stever*, 222 U.S. 167, 174-175 (1911); *Bigelow* v. *Forrest*, 9 Wall. (76 U.S.) 339, 348-349 (1869). Compare *United States* v. *Powell*, 423 U.S. 87, 90-91 (1975); *United States* v. *Alpers*, 338 U.S. 680, 682-684 (1950).

This construction would also best accord with Congress' intent *not* to act in the 1977 Amendments on the Administrative Conference's recommendations regarding specific changes in the allocation of jurisdiction between courts of appeals and district courts. See *supra*, at 29-33. Moreover, it would preserve the special judicial-review

provision in Section 206(b)(2)(B) of the Act, and the parenthetical exclusion in Section 307(b)(1) for action by EPA to establish emission standards and to prescribe other regulations under Section 202(b)(1) of the Act. The "other" actions of Section 307(b)(1) would not include actions under Section 206(b)(2)(B) or Section 202(b)(1).[47]

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[47] This construction of Section 307(b)(1) would also give effect to the House Committee's expressed intent that certain nationally applicable regulations be reviewed in the D.C. Circuit under the provisions of the first sentence of Section 307(b)(1). The three specific examples cited by the House Committee (see *supra*, at 29-30 (first quoted paragraph)) each related to regulations which would have had to be adopted in compliance either with the Administrative Procedure Act, 5 U.S.C. § 553, or with the more stringent procedural requirements of Section 307(d) of the Act. The first example refered to regulations promulgated under Part D (Sections 171-178) of the Act, 42 U.S.C. §§ 7501-7508, to implement the statutory requirements for nonattainment areas (*i.e.*, areas where air quality does not meet national ambient air quality standards). The second example concerned regulations to carry out a program for testing emissions of motor vehicles coming off assembly lines. The statutory basis for such regulations is Section 206(b)(1) of the Act, 42 U.S.C. § 7525(b)(1). Congress was aware of regulations already adopted by EPA on this subject, and wanted EPA to develop revised regulations. See H.R. (Conf.) Rep. No. 95-564, 95th Cong., 1st Sess., at 171 (1977). The final example pertained to regulations to implement a proposed mandatory program for inspection and maintenance of light duty vehicles to insure that the vehicles were complying with emissions standards. See H.R. 6161, 95th Cong., 1st Sess., § 208 (1977); H.R. Rep. No. 95-294, 95th Cong., 1st Sess., at 20-21 (1977). This portion of the House bill was retained in the version passed by the House, but it was deleted in the conference committee and consequently was not enacted. See H.R. (Conf.) Rep. No. 95-564, 95th Cong., 1st Sess., at 162-172 (1977).

Importantly, a full administrative record would have been available in each of the three rulemaking instances cited by the House Committee. Notably also, the reference by the House Committee to review of regulations establishing a program for testing emissions of motor vehicles coming off assembly lines conspicuously omits any reference to review of the *application* of such regulations to any particular instance. The omission is understandable. Review of the *application* of such regulations is governed by the special judicial-review provisions set out in Section 206(b)(2)(B) of the Act.

Several other interpretations of Section 307(b)(1) are available which also do less violence both to the words of the Section and to Congress' intent in adopting it than EPA's broad reading does. In *Utah Power & Light Co.* v. *Environmental Protection Agency*, 553 F.2d 215 (D.C. Cir. 1977), Judge Leventhal's opinion for the court held that an action by EPA in applying new source standards was reviewable in a district court and not in the court of appeals, because the action in applying (as contrasted to setting) the standards was not enumerated specifically in Section 307(b)(1). In adopting the 1977 Amendments and the 1977 technical amendments, Congress expressed no intent to overturn this holding. It thus continues to be viable as a possible reading of the statute.

Also, in *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F.2d 904 (D.C. Cir. 1979), the court's opinion notes prior suggestions that actions closely related to those specifically enumerated might also be reviewed in courts of appeals, especially where the related action was taken on the same record or on a record very similar to that of an enumerated action. *Id.*, 600 F.2d at 910 & n.56. This jurisdictional argument has been raised before, but not decided by, this court in *E.I. du Pont de Nemours & Co.* v *.Train*, 430 U.S. 112, 125 n.14 (1977). Nonetheless, the phrase "other final action" in Section 307(b)(1) could be read to accord with these suggestions.

3. *EPA's criticism of review in district courts is mistaken and misplaced.*

The thrust of EPA's arguments is directed toward advocacy of an expansive reading of Section 307(b)(1), such that the review-preclusion clause would also be broadly applicable. However, EPA also criticizes review in the district courts. The Agency offers five separate objections, none of which withstand evaluation.

First, despite EPA's contrary assertion, the record in this case is skeletal, as the court of appeals found. See *supra*, at 5-6. Compare EPA's Br. at 24.

Second, EPA says the record in the present case is similar to that which would be developed during EPA's actions under Section 111(j) and 112(c) of the Act, 42 U.S.C. §§ 7411(j), 7412(c), both of which sections are listed with particularity in the second sentence of Section 307(b)(1). See EPA's Br. at 24. The references to both Sections 111(j) and 112(c) were added by the 1977 technical amendments. See Clean Air Act Technical and Conforming Amendments, Pub. L. No. 95-190, § 14(a)(80), 91 Stat. 1393, 1404. Accordingly, there is no effective legislative history for the additions. See *supra*, at 38-40. Moreover, EPA's assertions as to record similarity are patently wrong insofar as actions taken under Section 111(j) are concerned. Section 111(j) calls on the Administrator of EPA to make specific findings regarding whether a waiver from the requirements of new source standards should be granted "to encourage the use of an innovative technological system" to reduce emissions. Section 111(j)(1)(A), as amended, 42 U.S.C. § 7411(j)(1)(A). The statute expressly requires these determinations to be made "after notice and opportunity for public hearings." *Id.* Therefore, a contemporaneously compiled administrative record would be available for court of appeals review and must form the basis of a determination by the Administrator under this section. Compare EPA's Br. at 15 n.11.

Section 112(c) is somewhat different. It calls for several types of actions by the Administrator which must reflect statutorily specified findings.[48] Although, unlike

[48] Subparagraph 112(c)(1)(A) allows a person to construct a new source or modify an existing source which will emit hazardous pollutants only where "the Administrator finds that such source

Section 111(j), nothing is said in Section 112(c) about prior notice and an opportunity for a hearing, this Section does emphasize the necessity for certain factual findings by EPA. These findings presumably must be made with the aid of an administrative record sufficient to support them. Otherwise, a court of appeals would not be able to carry out its review. Section 112 focuses entirely on "hazardous air pollutants", and one can only conclude that Congress wanted special review because of the nature of the pollutants involved. Congress elsewhere has made exceptional provisions applicable where such hazardous pollutants are involved. See *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 282-283 (1978).

Third, EPA claims that the discovery procedures available in district courts would not advance judicial review. EPA's Br. at 24. This contention does not square with the experiences of courts or of private litigants. Contrary to EPA's implications, discovery in district courts is not available to develop a *new* record for review, but rather to compile and verify the information and contentions which were before the agency at the time of the decision. In short, discovery serves the purpose of verifying the contemporaneous record, where the agency itself has not kept a current docket of materials and may not have had any intention of basing its decision only on

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if properly operated will not cause emissions in violation of [a hazardous air emission] standard."

Subparagraph 112(c)(1)(B) provides that a source may not emit air pollutants in violation of standards issued under Section 112. When taken together with Section 113(a)(3), as amended, 42 U.S.C. § 7413(a)(3), Subparagraph 112(c)(1)(B) authorizes EPA to issue remedial administrative orders regarding such violations.

Subparagraph 112(c)(1)(B)(ii) authorizes the Administrator to grant a waiver of up to two years to comply with a hazardous air emission standard where he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

items in a discrete record.[49] Discovery for this purpose is entirely consistent with *Federal Power Commission* v. *Transcontinental Gas Pipeline Co.*, 423 U.S. 326, 331 (1976); *Camp* v. *Pitts*, 411 U.S. 138, 141-143 (1973); and *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971).[50]

Discovery also serves the very important purpose of allowing a factual record to be developed regarding "ripeness" claims and other similar contentions by agencies urging dismissal of review actions. A district court could assess the hardship to the parties of granting or denying immediate review by taking evidence on the impact of the challenged rule. A court of appeals might be able to address this question on the basis of affidavits. However, affidavits often cannot be obtained and only the compulsory discovery processes of the district courts are capable of supplying needed facts.[51] Congress dealt

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[49] Moreover, as the Fifth Circuit has stated in a prior decision, "[r]emand to the agency for a statement of reasons for its decision would risk after the fact rationalization, which the evidence gathering powers of a trial court can more easily penetrate." *Save the Bay, Inc.* v. *Administrator of Environmental Protection Agency*, 556 F.2d 1282, 1292 (5th Cir. 1977) (citation omitted).

This Court has also observed that the agency's response to a remand by a reviewing court for formal findings or an adequate explanation "will, to some extent, be a '*post hoc* rationalization' and thus must be viewed critically." *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971).

[50] In fact, the district court before which the companion case to the present one is pending rejected EPA's Motion For a Protective Order barring discovery, and ordered EPA to respond to interrogatories directed solely to identifying materials available to EPA at the time it made its determinations regarding the waste-heat boilers. *PPG Industries, Inc.* v. *Costle*, Civil Action No. 771271 (W.D. La.) (order dated May 22, 1979, denying EPA's motion for a protective order).

[51] The utility of the compulsory discovery processes available to district courts became evident in *Rubber Manufacturers Ass'n* v. *Costle*, Civil Action No. 79-189 (D. Del. filed April 17, 1979). In that action twelve rubber companies sought review in the district court of EPA's action in issuing a "Control Technique Guideline"

with this problem in the Administrative Orders Review Act by allowing a court of appeals to remand to a district court for a hearing on the disputed question. See 28 U.S.C. § 2347(b)(3). A reviewing court of appeals acting under Section 307(b)(1) of the Clean Air Act does not have that option.[52]

Fourth, EPA argues that judicial review in courts of appeals would give rise to more prompt, definitive rulings than review in district courts. See EPA's Br. at 24-25. This contention contradicts explicit conclusions of the court of appeals in the present case. The Fifth Circuit feared that courts of appeals generally would not be able to provide prompt review, and suggested that delayed review would be costly and prejudicial to the parties:

> At this level [*i.e.*, the court of appeals], only after hearing, which may be long delayed because of other calendar commitments, can it be known whether the record is sufficient for review purposes. An insufficient record may necessitate a remand for fact-finding and record completion and a second court appearance, often before other judges, long delayed.

(587 F.2d at 245, Pet. App. 20a.)

The Fifth Circuit is notable for the long delays (currently approximately 3 years) between the completion of briefing in a case and the date of argument. The present case was heard promptly only because the Fifth Circuit granted PPG's motion to expedite argument.[53] Other circuits such as the Ninth Circuit are substantially in arrears in hearing argument in "ready" cases. Commentators have recognized that, from the viewpoint of those responsible for or concerned with court administration, the time of a circuit judge is a scarce resource which ought to be allocated wisely. See Administrative Conference Recommendations 1975, 1 C.F.R. § 305.75-3 (Recommendation No. 75-3, ¶ g). See also Currie and Goodman, *Judicial Review of Federal Administrative Action: Quest For The Optimum Forum*, 75 Colum. L. Rev. 1, 18-19, 24-25 (1975). EPA's reading of the "other final action" phrases of Section 307(b)(1) would require that many minor matters be litigated in the courts of appeals as an original matter, or review would be foreclosed entirely. See *supra*, at 3-4 n.2. In short, as a general matter the district courts offer opportunities for more prompt adjudication than do the courts of appeals, and the expenditures of judicial resources in obtaining a decision are considerably reduced. This is especially so in a case such as the present one, where PPG had no choice but to file its "protective" petitions for review in the Fifth Circuit where action on pending matters is long-delayed because of the court's backlog of pending cases. The Fifth Circuit was the "appropriate" circuit under Section 307(b)(1) because the facilities at issue were located in Lake Charles, Louisiana.

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for emissions of volatile organic compounds from tire manufacturing plants. The plaintiff companies contended that EPA was giving the Guideline the effect of a binding rule by taking a number of steps to insure that States incorporated it into revisions of their State Implementation Plans. EPA moved to dismiss the action in district court, contending among other things that its action in issuing the Guideline was not ripe for review. Affidavits could not be obtained from State officials. Three officials of States were, however, deposed, giving testimony regarding the steps by which EPA was seeking to secure incorporation of the Guideline into State Implementation Plans as a regulatory requirement, and also regarding the impact of these steps and the Guideline on States and regulated parties. Briefing of EPA's motion to dismiss, and of cross-motions by the parties for summary judgment has been completed, and a hearing on the several motions was held on November 19, 1979. No decision has been rendered to date.

Obviously a court of appeals is not able to provide procedures comparable to those used in the *Rubber Manufacturers* case to develop facts needed to resolve a dispute over justiciability.

[52] Similar evidentiary problems arise in connection with proceedings on a motion for stay in a court of appeals. In contrast, a motion for preliminary injunction in a district court often involves the taking of testimonial evidence.

[53] Argument could not be expedited in many cases of this nature in the courts of appeals or the courts' dockets would be disrupted. Moreover, simply presenting motions to expedite requires additional time of the circuit judges which could better be spent working on the merits of pending cases.

EPA's contention also presupposes that the losing party in a district court action will always take an appeal to the circuit court. This assumption is erroneous. Numerous environmental cases in district courts do not engender appeals. The parties, presumably, will obtain a reasoned decision from the district court, and, in practice, often appear to be satisfied at that point. Even EPA for example did not press an appeal from the district court's decision adverse to it in *Manufacturing Chemists Ass'n* v. *Costle*, 455 F.Supp. 968 (W.D. La. 1978), which certainly involved questions of broad applicability and importance. As commentators have said: "Two-tier review [involving an appeal from a district court decision] means greater expenses and delay for those litigants who persevere to the appellate stage but lesser expense to the 90 percent who do not." Currie and Goodman, *supra*, 62 Colum. L. Rev. at 25. Compare EPA's Br. at 26-27 n.20.[54]

Fifth, EPA notes that review in district court would not be available respecting actions by the Agency which are not "final", just as review in such a case would be unavailable in a court of appeals. See EPA's Br. at 26. PPG and Conoco agree. This observation is irrelevant to the issues involved here. In this case, PPG has sought review of a "final" action in district court, not action which is preliminary or otherwise not final. EPA errs in trying to read into the decision of the court an "assumption" that review of non-final actions would ordinarily be available in district courts. Compare EPA's Br. at 26, with 587 F.2d at 242, Pet. App. 11a.

In sum, just as EPA has erred in urging an expansive reading of Section 307(b)(1), the Agency has also put forward mistaken and misplaced policy criticisms of review in district courts.

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[54] In particular the district court offers a convenient forum for resolution of a locally applicable action, which is more likely to involve determinations made by EPA on an informal, non-record basis.

II. IF EXPANSIVELY CONSTRUED, THE REVIEW PROVISIONS OF SECTION 307(b) RELATING TO "OTHER FINAL ACTION" WOULD VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Section 307(b) places sharp limitations on the power of the lower federal courts to entertain fact-based, statutory, or even constitutional claims pertaining to certain actions by EPA. Those actions by the Agency which are subject to review under strict time constraints in courts of appeals under the terms of Section 307(b)(1) cannot subsequently be raised or presented as a defense in civil or criminal cases for enforcement. See Section 307(b)(2).

This Court has recognized Congress' power under article III of the Constitution to restrict the jurisdiction of lower federal courts. See *Lockerty* v. *Phillips*, 319 U.S. 182, 187-188 (1943). Also, this Court has ruled that, at least in emergency war-time conditions, "restricting judicial review of [an] administrative determination to a single court[,] . . . *so long as it affords to those affected a reasonable opportunity to be heard and present evidence*, does not offend against due process". *Yakus* v. *United States*, 321 U.S. 414, 433 (1944) (emphasis added) (citations omitted).

The juxtaposed paragraphs of Section 307(b) do not, however, afford the "reasonable opportunity to be heard" which due process requires, at least when the "other final action" clauses of Section 307(b)(1) are construed as expansively as EPA urges. See *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972); *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932). If one accepts for purposes of argument the Agency's construction of Section 307(b)(1), then many, very informally taken actions would be brought within the coverage of the special and limited review provisions of that Section. Like the determina-

tions in the present case, these actions would be "final" in nature and thus subject to some review. But they would have been taken without benefit of any hearing or other proceeding. Furthermore, the Agency's decision-maker typically would not have been constrained by any need to confine consideration to materials in a contemporaneously compiled administrative record. Indeed, the rationale for the agency decision may not even be specified.[55] See, *e.g.*, *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971). In these circumstances, nothing inherent in the nature of the action taken suggests to the person affected that failure to seek prompt review will result in being forever foreclosed from obtaining review. Moreover, the notice given by the Agency regarding the action may not suffice to convey a warning regarding the sharply limited opportunity for review.[56] The "other final action" phrases of Section 307(b)(1) do not by themselves provide a sufficient warning. In short, for every informal actions such as the one at issue in this litigation, "a reasonable opportunity to be heard" will not be present as a practical mater. As EPA would construe it, Section 307(b) fails to provide due process.

Moreover, Congress has made no finding of any compelling need for such limited and constrained review. This Court's decision in *Yakus* v. *United States*, 321 U.S. 414 (1944), upholding limited opportunities for review, may be sustainable as an exercise of the war powers of Congress and the President found in Article I, § 8 and

[55] In the present case EPA did not specify its rationale for the determination as to what requirements actually would be applied to the waste-heat boilers. See *supra*, at 10-12.

[56] The Agency observes that it does not always, or perhaps even usually, publish notice in the *Federal Register* that it has taken action. See EPA's Br. at 26. Where notice is not published in the *Federal Register*, as none was in this case, the Agency *now* states that it construes this circumstance to toll the running of the sixty-day period for seeking review specified in Section 307(b)(1).

Article II, § 2 of the Constitution. However, the present circumstances are quite different. Other administrative agencies with comparable responsibilities function without such limitations on the reviewability of their actions. The Occupational Safety and Health Administration ("OSHA") is an example.[57]

Finally, the expansive reading which EPA would give Section 307(b)(1) produces such a complicated and convoluted review and enforcement mechanism that an aggrieved party's claim could be simply lost in a shuttle among courts. The damage to affected parties is graphically illustrated where, as here, EPA has not given notice in the *Federal Register* that it has informally taken a final action under the Act. Given the nature of these informal actions, this lapse is understandable. EPA reads Section 307(b) such that the 60-day limitation on review is tolled until notice actually is published in the *Federal Register*, which event may never take place. See EPA's Br. at 26 n.19.[58] Nevertheless, if EPA subsequently brings an enforcement action against the affected party,

[57] Judicial review of OSHA's orders issuing regulations and standards is available directly in the courts of appeals under the special terms of Section 6(f) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(f). *E.g. Industrial Union Department* v. *American Petroleum Institute*, Nos. 78-911 and 78-1036. Review of standards is also available at the enforcement stage. See *Atlantic & Gulf Stevedores, Inc.* v. *Occupational Safety & Health Review Commission*, 435 F.2d 541, 550-551 (3d Cir. 1976).

[58] PPG's and Conoco's due process claim also relates to the absence of statutory standards for EPA's decision whether or not to publish notice in the *Federal Register* that it has taken action. At least under EPA's sweeping views of its powers under the statute, its own standard-bereft decision regarding notice governs the jurisdiction of federal courts. In PPG's and Conoco's view, Congress could not transfer its power under article III, section 1 of the Constitution to prescribe the jurisdiction of the lower federal courts to EPA, at least by a delegation of powers bereft of standards. See *Sibbach* v. *Wilson*, 312 U.S. 1, 9-10 (1941); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935). See also Brief for Petitioner in the court of appeals, at 40-46.

Section 113 requires that the enforcement proceedings be initiated in a district court. Because of the operation of the review-preclusion clause, Section 307(b)(2), the district court could not entertain any defenses based upon the asserted invalidity of the agency action being enforced. Assuming that EPA does not then change its now-stated position on the tolling of the 60-day limitation in Section 307(b)(1), a concurrent petition for review of the underlying agency action could then be brought in a court of appeals. The affected party would have to ask the district court to stay its hand in the enforcement case pending action by the court of appeals on the petition for review. EPA would have no contemporaneously compiled record to certify to the court of appeals for its review. Presumably therefore, the Agency would have to try to reconstruct the record, perhaps years after the action had been taken on an informal basis. Where the court of appeals could not meaningfully review the Agency's action, it probably would have no choice but to remand to EPA for an explication of its action. After the proceedings before the Agency on remand had taken place (these proceedings surely would be colored by the enforcement action still pending in district court), the record would go back to the court of appeals for further review.[59] After new proceedings in the court of appeals and decision by that court, the results would then be available to be inserted as binding law in the district court enforcement action. By the time the proceedings would have reached this stage, the parties would be exhausted, the courts exasperated, and the environment unchanged (except perhaps by the passage of years). Only the Agency presumably would be pleased.

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[59] The Agency's action on remand would be a *post hoc* rationalization which would have to be carefully examined by the reviewing court. See *supra*, at 54 n.49.

This entire convoluted scenario is neither necessary nor inevitable. It would arise only if this Court accepts the Agency's expansive reading of Section 307(b)(1). The scenario does illustrate graphically why parties affected by informal Agency action as a practical matter would be denied the opportunity to seek judicial review of that action or the opportunity to present otherwise available defenses. Constructed as EPA urges, Section 307(b) would offend the due process clause.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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December 22, 1979

Appendices

APPENDIX A

PPG INDUSTRIES
PPG INDUSTRIES, INC.
INDUSTRIAL CHEMICAL DIVISION
P.O. Box 1000
Lake Charles, La. 70601

December 3, 1979

Ms. Diana Dutton, Director
Enforcement Division
U.S. Environmental Protection Agency
1201 Elm Street
Dallas, TX 75270

Re: Waste Heat Steam Generator —
Change of Fuel

Dear Ms. Dutton:

This is to notify your office of a change of fuel oil on our waste heat boiler No. 2 at Powerhouse C, PPG Industries, Inc. Lake Charles facility. The natural gas supply was interrupted by the supplier and replaced by 0.7 wt. % sulfur fuel oil. The duration of the fuel oil use was from 10:00 a.m., November 30 to 6:00 p.m., December 1, 1979.

Very truly yours,

/s/ F. Anne Corbello
F. ANNE CORBELLO
Environmental Control Assistant

FAC:as

cc: Mr. J. F. Coerver
Louisiana Air Control Commission
(re: State Permit No. 473)

bcc: R. J. Samelson
V. P. Wynne
C. Lettow
W. J. Peard/J. E. Wyche
H. Hank
E. L. Cook/D. Heffer

APPENDIX B

41 Fed. Reg. 56767-56769 (December 30, 1976):

Title 1—General Provisions

CHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

PART 305—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

PART 310—MISCELLANEOUS STATEMENTS

Miscellaneous Amendments

The Administrative Conference of the United States was established by the Administrative Conference Act, 5 U.S.C. 571-576, to study the efficiency, adequacy and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and to make recommendations for improvement to administrative agencies, collectively or individually, to the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 574(1)).

The Administrative Conference of the United States at its Fifteenth Plenary Session, held December 9-10, 1976, adopted two Recommendations and one formal Statement. Recommendation 76-4 recommends amendments to the judicial review provisions of the Clean Air Act and Federal Water Pollution Control Act. Recommendation 76-5 urges Federal agencies normally to employ pre-adoption or post-adoption comment procedures when promulgating an interpretive rule of general applicability or statement of general policy. The Conference Statement is addressed to procedures to deal with an emergency shortage of natural gas.

1. The table of contents to Part 305 of Title 1, Chapter III, CFR is amended to add the following sections:

Sec.

305.76-4 Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act (Recommendation No. 76-4)

304.76-5 Interpretive Rules of General Applicability and Statements of General Policy (Recommendation No. 76-5)

2. Section 305.76-4 is added to Part 305 to read as follows:

§ 305.76-4 Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act (Recommendation No. 76-4).

(a) The Congress has enacted provisions for judicial review in the Clean Air Act and the Federal Water Pollution Control Act (FWPCA) that are in some respects inconsistent, incomplete, ambiguous and unsound.

(b) Courts have sometimes felt constrained to stretch these statutes to achieve sensible results. In other instances, courts seem to have ignored sensible general congressional direction in an attempt to do justice in particular cases. On yet other occasions courts have felt compelled by unclear provisions to reach undesirable results that Congress probably did not intend.

(c) Experience under the two Acts has highlighted a variety of problems in the interpretation and application of the judicial review provisions, all of which are likely to be addressed by Congress in the near future.

(d) This series of recommendations urges that, when Congress reconsiders the judicial review provisions of the principal pollution statutes, it rationalize, alter and clarify them, guided especially by the principle that juris-

dictional provisions should draw bright lines to minimize the waste and expense of litigation over whether a case has been brought in the right court. One recommendation is addressed to the Judicial Conference and calls upon the courts, pending congressional action to clarify their powers, to utilize their discretion to transfer judicial review proceedings where transfer will avoid undue duplication of litigation.

More specifically, the Conference has in view these considerations:

1. Section 509(b) of the FWPCA provides that all standards promulgated under it by the Environmental Protection Agency, including national standards, are to be reviewed in the United States Court of Appeals for a circuit in which the petitioner resides or transacts business. Under Section 307(b) of the Clean Air Act, on the other hand, certain nationally applicable standards are to be reviewed only in the Court of Appeals for the District of Columbia Circuit, but the EPA's actions in approving or promulgating state implementation plans are reviewable only "in the United States Court of Appeals for the appropriate circuit." Thus the FWPCA provides for a decentralized review of national standards, whereas the Clean Air Act requires that analogous standards be reviewed only in the D.C. Circuit. This inconsistency in approach should be resolved; the advantages of expeditious and authoritative review of all national standards in the D.C. Circuit suggests that it is the FWPCA's venue provision which should be amended. All national standards under the FWPCA should be made reviewable in the D.C. Circuit. Review of all other regulations, standards and determinations that are reviewable in the courts of appeals under the FWPCA should be in the circuit containing the affected state or facility. These amendments would entirely supplant the present provisions for review in the circuit in which the petitioner resides or transacts business.

The Clean Air Act's specification of "appropriate circuit" as the venue for review of state implementation plan approvals has also created uncertainties, especially when several plan approvals are challenged on identical grounds. Although a perfect resolution is impossible, an amendment, clarifying that the appropriate circuit is the one containing the state whose plan is challenged, would eliminate much of the prospect of threshold litigation over the question of which is the appropriate circuit, and would also avoid the splitting of cases into two different forums whenever local and national issues are present in the same case. The possibility of undue duplication of proceedings that might result can be met by increasing the flexibility of available transfer provisions to remove doubts about the authority of any court of appeals to transfer a case to any other court of appeals.

2. Section 304 of the Clean Air Act and Section 505 of the FWPCA authorize citizen suits in the district courts to require the EPA Administrator to perform "any act or duty under this Act which is not discretionary." Some district courts have accepted jurisdiction under Section 304 over cases that amount to challenges to the Administrator's approval and promulgation of state implementation plans, despite the provision of Section 307 for exclusive jurisdiction in the courts of appeals to review such action. The citizen-suit provisions should not furnish an alternative or premature method of review of questions that can be raised by direct review of the EPA's actions in the courts of appeals.

The proper scope of the present citizen-suit provisions is especially unclear in the context of standard-setting, where the line between failure to act and failure to act properly is dim. The difficulty of drawing such a distinction is ample reason for giving the courts of appeals

exclusive jurisdiction of actions to compel or to postpone the issuance of regulations whose validity would properly be determined in a court of appeals. It is recognized that in its review of such issues a court of appeals might conclude that the administrative record requires amplification. Since courts of appeals normally do not hold evidentiary proceedings, provision should be made for prior resort or remand to the EPA (or, if that is inappropriate, to the district court) to meet that need.

To prevent unfairness from a litigant's choice of the wrong court, Congress should provide for transfer between district courts and courts of appeals of petitions and complaints filed under the Acts. The Court of Claims transfer provision provides a good model.

3. Although both Acts provide expressly for review in the courts of appeals and for citizen suits in the district courts, it remains possible in some circumstances to obtain non-statutory review under general federal question jurisdictional statutes. But the citizen-suit provisions of both Acts require the plaintiff to give the EPA 60 days' notice of the intended district-court action. Congress should make clear that where a non-statutory review action is filed alleging grounds that correspond to those appropriate for the filing of an action under such citizen-suit provisions, failure to comply with the notice requirements of those provisions will require a dismissal of the case.

4. The Clean Air Act and the FWPCA provide that certain regulations reviewable by petition to the courts of appeals "shall not be subject to judicial review in civil or criminal proceedings for enforcement." Moreover, challenges to the validity of regulations must be made in the court of appeals within 30 days (air) or 90 days (water) after promulgation, unless the challenge is based "solely on grounds arising after" the statutory period.

The express preclusion of review at the enforcement stage creates a highly unusual and unnecessary harsh restriction on the right to challenge the validity of a regulation to which one is subject. Congress should amend the Acts to allow the validity of a regulation to be challenged in defense to an enforcement proceeding. It should also amend the Clean Air Act to extend the time limit for filing petitions for review in the court of appeals to 60 days and, for consistency, amend the FWPCA to reduce the 90-day period for filing a petition thereunder to 60 days. Finally, the time limits in both Acts should be made inapplicable where the petitioner can show reasonable grounds for failure to file a timely petition.

5. Not every action of the EPA under the Clean Air Act or the FWPCA is made reviewable in the courts of appeals. Some of the omissions appear to be inconsistent with the general statutory plan, and corrective amendments are desirable.

6. Each of the four judicial review and citizen-suit provisions in the Clean Air Act and the FWPCA presents a different standard for who may petition for review or sue. This leads to undesirable confusion and inconsistency in the administration of the Acts.

RECOMMENDATION

A. *Venue in the Courts of Appeals*

1. Congress should provide for centralized review of national standards under the FWPCA, as is now provided under the Clean Air Act, by amending Section 509(b) [33 U.S.C. § 1369(b)] to provide for the review of all such national standards in the Court of Appeals for the District of Columbia Circuit.

2. Congress should further amend section 509(b) of the FWPCA to provide that review of regulations, stand-

ards or determinations affecting single states or facilities be had in the circuit containing the state or facility.

3. Congress should amend section 307(b) of the Clean Air Act [42 U.S.C. § 1857h-5(b)] to make explicit that the Administrator's action in approving or promulgating state implementation plans is reviewable in the circuit containing the state whose plan is challenged.

4. Courts of appeals, when reviewing cases arising under the Clean Air Act or FWPCA, should utilize existing transfer powers to avoid undue duplication of proceedings, and Congress should amend the Acts or the transfer statute [28 U.S.C. § 2112(a)] to remove doubts about the authority of any court of appeals to transfer such cases to any other court of appeals to avoid undue duplication and in the interest of the administration of justice.

B. *Choice between District Court and Court of Appeals for Review*

1. Congress should amend the citizen-suit provisions of the Clean Air Act [Section 304, 42 U.S.C. § 1857h-2] and FWPCA [Section 505, 33 U.S.C. § 1365] to make clear that, insofar as suits against the Administrator of the EPA are concerned, these sections do not provide an alternative or premature method of review of questions that can be raised under the sections that provide for direct review of the EPA's actions in the courts of appeals [Section 307(b), 42 U.S.C. § 1857h-5(b); Section 509, 33 U.S.C. § 1369].

2. Congress should amend the Clean Air Act and FWPCA to provide that courts of appeals have exclusive jurisdiction of actions to compel or to postpone the issuance or revision of regulations whose validity is to be determined in a court of appeals. The amendments should provide that where there is need for the development of

a factual record, prior resort or remand shall be made to the EPA or, if that is inappropriate, to the district court.

3. Congress should provide, by analogy to 28 U.S.C. § 1506, for transfer between courts of appeals and district courts when a proceeding to review EPA action under the Clean Air Act or FWPCA is filed in the wrong forum.

C. *Limitation of Non-Statutory Review*

Congress should amend the statutes to make clear that when a non-statutory review action is filed alleging grounds that correspond to those appropriate for the filing of a citizen suit under Section 304 of the Clean Air Act [42 U.S.C. § 1857h-2] or Section 505 of the FWPCA [33 U.S.C. § 1365], failure to comply with the notice requirements of those sections will require a dismissal of the case.

D. *Raising Defenses at the Enforcement Stage*

1. Congress should amend the Clean Air Act and FWPCA to permit the validity of a regulation to be challenged in defense to an enforcement proceeding.

2. Congress should amend Section 307(b) of the Clean Air Act [42 U.S.C. § 1857h-5(b)] and Section 509(b) of the FWPCA [33 U.S.C. § 1369(b)] to prescribe 60 days as the period within which, under both statutes, a petition for review must be filed in the courts of appeals.

3. Congress should amend the Clean Air Act and FWPCA to ensure that petitions for review of regulations may be filed after the expiration of the time limits of Sections 307(b) and 509(b), when the petiitoner can show a reasonable ground for failure to file a timely petition.

E. *Actions Subject to Court-of-Appeals Review*

1. Congress should amend section 509(b) of the FWPCA [33 U.S.C. § 1369(b)] to make clear that the following actions by the EPA are reviewable in the courts of appeals:

a. Promulgation or approval of water-quality standards under Section 303 [33 U.S.C. 1313].

b. Promulgation of effluent guidelines under section 304 [33 U.S.C. 1314].

c. Promulgation of regulations governing the discharge of oil or hazardous substances under section 311(b) [33 U.S.C. 1321(b)].

d. Promulgation of standards for marine sanitation devices under Section 312 [33 U.S.C. 1322] or determinations that a state may completely prohibit the discharge from all vessels of any sewage under Section 312(f) [33 U.S.C. § 1322(f)].

2. Congress should amend the Clean Air Act to make those new-car emission standards not now reviewable under section 307(b) [42 U.S.C. § 1857h-5(b)], reviewable in the courts of appeals.

F. *Standing*

Congress should adopt a single test of standing to govern all proceedings for judicial review under the Clean Air Act and FWPCA.

SEPARATE STATEMENT OF G. WILLIAM FRICK

(1) Recommendation A.2. should be amended to provide that where "national issues" are involved they should be reviewed in the D.C. Circuit. Recommendation A.3. should be amended in the same fashion.

Cases involving permits and permit programs under the FWPCA sometimes involve generic issues that apply to EPA's actions nationwide. For essentially the reasons discussed in our comments on recommendation A.3., below, we believe such issues should be reviewed in the D.C. Circuit. This result could be specified, without disturbing the general thrust of the Recommendation, by amending § 509 of the FWPCA as suggested in our comments of November 12, 1976.

Although approval and promulgation of State implementation plans (SIP's) under the Clean Air Act usually involve issues peculiar to the affected States, such actions sometimes involve generic determinations of nationwide scope or effect. Examples include EPA's granting of two-year extensions of the date for attainment of national ambient air quality standards in a number of metropolitan areas[1] and its promulgation of generic regulations (applicable to all States) that require prevention of significant deterioration of air quality (40 CFR 52.21). We view such actions as virtually identical to promulgation of "national standards",[2] as to which recommendation A.1. expresses a preference for review in the D.C. Circuit.

Under the existing law, it is possible to argue that the D.C. Circuit is the "appropriate circuit" for review of "national" SIP issues, and three courts of appeals have so held.[3] Recommendation A.3., however, would provide

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[1] See *NRDC* v. *EPA*, 475 F.2d 968 (D.C. Cir. 1973).

[2] As with national standards, such actions typically involve establishment or application of uniform principles for all States, are taken on a single administrative record, and do not involve factual questions unique to particular geographical areas.

[3] *Dayton Power & Light Co.* v. *EPA*, 520 F.2d 703, 706-07 (6th Cir. 1975) (regulations for prevention of significant deterioration); *NRDC* v. *EPA*, 475 F.2d 968, 969-70 (D.C. Cir. 1973) (two-year extensions and similar issues); *NRDC* v. *EPA*, 465 F.2d 492, 494 (1st Cir. 1972) (same).

that such issues, together with all other SIP issues, must be in the local circuit. Although recommendation A.4. would promote transfer to avoid "undue duplication of proceedings", it would provide no basis for arguing that the D.C. Circuit is the appropriate transferee forum.

As indicated by Professor Currie in his report, Congress intended review in the D.C. Circuit of "matters on which national uniformity is desirable." Among the reasons for this are the D.C. Circuit's obvious expertise in administrative law matters and its sensitivity to Congressional mandates. In addition, the D.C. Circuit has become thoroughly familiar with the Clean Air Act—a very complex statute—and with its equally complex legislative history. We believe it makes sense to centralize review of "national" SIP issues in the D.C. Circuit, taking advantage of its administrative law expertise and facilitating an orderly development of the basic law under the Act, rather than to have such issues decided separately by a number of courts, some of which would probably lack frequent exposure to the Act and its legislative history. Moreover, the validity of a nationally applicable regulation will not turn on the particulars of its impacts within a given Circuit.

(2) Recommendation D.1., which would allow the challenge of validity of regulations in enforcement proceedings, should be deleted.

The "legislative history" of this recommendation suggests that it is inspired in part by a concern that the time limits for filing of petitions for review of the validity of regulations are too short, and in part by a concern that *any* time limit may unreasonably constrain the opportunity for such review.

As to the first factor we would much prefer the solution offered by Recommendation D.2. As to the second, we oppose the recommendation on several grounds. Permitting challenges to validity in enforcement would leave open the question of validity indefinitely, notwithstanding Congress' intent to have it decided expeditiously;[4] would require EPA to retain its often immense records indefinitely; would mean district court rather than court of appeals review of validity, notwithstanding the clear intent of Congress; and might very well lead to conflicting results, with resolution of conflicts (if at all) only after review by the courts of appeals and the Supreme Court. In our view, facial validity need be determined only once and should be determined expeditiously; there are other mechanisms for relief based on factors peculiar to individual sources (see comments on recommendation D.3.), and it makes no sense to require every district court presented with the issue of validity to engage in duplicative review of the often immense records involved.

The Recommendation glosses over that fact that State implementation plans, which have and will continue to make up the vast majority of onerous air pollution requirements, can be challenged facially and on grounds of infeasibility through administrative and judicial review channels in the States.[5]

Finally, as Professor Walter Gellhorn observed at the Plenary Session, there is an inherent contradiction between Recommendations D.1. and D.3., viz., the argument is for extending the deadlines for obtaining review while at the same time espousing that there should be no deadline for obtaining review. That the federal courts involved are at different levels does not cure this contradiction.

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[4] See *Kennecott Copper Corp.* v. *EPA*, 462 F.2d 846, 849 & nn. 14-15 (D.C. Cir. 1972). Expeditious resolution of SIP issues is particularly important because Congress mandated attainment of the health-protective ambient air quality standards (via SIP's) by a time certain, regardless of economic or technical feasibility.

[5] See *Union Electric Co.* v. *EPA*, 96 S. Ct. 2518 (1976).

(3) Recommendation D.3., which would allow late filings of petitions for review upon reasonable grounds shown, should be deleted.

The "legislative history" of this recommendation suggests a number of concerns that may have prompted it: (a) the problem of short time limits; (b) the problem of persons who fail to file through carelessness; (c) lack of opportunity for consideration of individual factors that might affect validity; and (d) the problem of persons who are unaffected by a regulation until after the deadline for filing has passed. My comments are as follows:

(a) Short time limits. We prefer Recommendation D.2. as providing a more direct solution to this problem, if it is thought to be a problem. Protection of one's rights need not await detailed analysis of what EPA has actually done; common practice is to file one-paragraph petitions alleging that EPA's action was arbitrary or capricious, or similarly general grounds.

(b) Carelessness. The industries we regulate generally submit extensive comments on proposed regulations, sometimes "lobby" the agency extensively, often mount well-coordinated attacks on final regulations in court, and seem to follow the development of regulations rather well. And, even before publication of proposals in the FEDERAL REGISTER, they receive notice through EPA's gathering of supporting data from them, through trade associations, through industry representatives on EPA advisory committees, or during pre-publication review by other federal agencies. We believe the public interest in early resolution of validity (clearly intended by Congress) should outweigh the interests of those who fail to file timely petitions through carelessness.

(c) Individual factors that might affect validity. As Professor Currie seems to acknowledge in his report, individual factors are often if not always irrelevant to the

validity of EPA regulations. Those cited as examples do not appear to be grounds for challenge of SIP approvals,[6] for example, or of national standards adopted under §§ 111 or 112 of the Clean Air Act (42 U.S.C. 1857c-6, 1857c-7). Relief based on such factors may be available through a variety of mechanisms,[7] but they do not go to the validity of the regulations.

(d) Previously unaffected parties. In our view, persons who choose to do business in a regulated industry (or to expand into a geographical area subject to controls) after the establishment of applicable regulations take the business (or the area) as they find it. If a company invents a new process that presents particular problems under an applicable regulation, it may petition for revision of the regulation.

Finally, we note that this recommendation would leave the question of validity open indefinitely, with all the problems that would entail (see discussion of Recommendation D.1.).

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[6] See *Union Electric Co.* v. *EPA*, *supra*.

[7] Under the Clean Air Act, for example, relief may be available by way of SIP revisions (including variances) approved or promulgated by EPA, postponements of SIP requirements under 42 U.S.C. 1857c-5(f), enforcement orders fixing a "reasonable time" for compliance (42 U.S.C. 1857-c-8(a)(4)), equitable relief provided by court order in enforcement proceedings (*see* 42 U.S.C. 1857c-8(b)), waivers or exemptions under 42 U.S.C. 1857c-7, or petition for revision of any applicable regulation.

FOR ARGUMENT

No. 78-1918

In the Supreme Court of the United States

OCTOBER TERM, 1979

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

PPG INDUSTRIES, INC., AND CONOCO, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1918

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

PPG INDUSTRIES, INC., AND CONOCO, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Under our view of Section 307(b)(1), all preenforcement review is by the courts of appeals.[1] If the record is inadequate for such review, the court of appeals may remand to the agency for a more complete record. Although PPG repeatedly characterizes our interpretation as "extreme" and as "contradictory and conflicting" (Br. 2, 17), our construction is far more practical than the complicated scheme offered by PPG.

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[1]Once the agency commences administrative enforcement proceedings under Section 113, preenforcement review is no longer available (see our opening brief at 26 n.19). 42 U.S.C. (Supp. I) 7413(a).

Under PPG's interpretation, jurisdiction depends entirely on the form of the record of the challenged administrative action. If the agency action was based on a "contemporaneously compiled administrative record" (Br. 24), then review lies only in the courts of appeals. If the record is of lesser quality, then only the district courts have jurisdiction (under 28 U.S.C. 1331).[2] Of necessity, each "final action" case would require a preliminary evaluation of the substance of the record to determine which court had original jurisdiction. What is more, the two courts might not agree. No decision to take jurisdiction by a district court would ever be certain until appellate review confirmed it. An erroneous decision by a district court to assume jurisdiction would invite enormous and wasteful discovery and other proceedings. An erroneous decision by a court of appeals to assume jurisdiction would waste its time, the litigants' time, perhaps this Court's time, and inevitably delay reaching the merits. In short, a constant shuttle between courts is an unavoidable consequence of PPG's interpretation.[3] By construing Section 307(b)(1) to place judicial review of all final actions of the Administrator in the courts of appeals, such wasteful exercises are wholly eliminated.[4]

[2]Congress knows exactly how to make a broad grant of jurisdiction to courts of appeals, and yet preserve limited district court jurisdiction when that is intended. In the judicial review provision of the Safe Drinking Water Act, Pub. L. No. 93-328, 88 Stat. 1689, 42 U.S.C. 300j-7, enacted in 1974, prior to the amendments to Section 307(b)(1), Congress placed jurisdiction to review certain enumerated actions in the court of appeals for the District of Columbia. The regional courts of appeals were given jurisdiction to review the promulgation of "any other regulations," issuance of "any order," or the Administrator's actions in "making any determination" under the Act.

Congress, however, specifically placed review in the district courts of actions granting or refusing exemptions or waivers under the Act. Otherwise, review of those actions would have been in the regional courts of appeals under the broad terms of their jurisdiction.

2. The premise of PPG's argument is that the specifically enumerated items in Section 307(b)(1) are actions that the Act (or the Administrative Procedure Act) requires to be made on what PPG variously describes as a "definite and contemporaneously compiled record," a "complete and contemporaneously compiled record" a "comprehensive administrative record;" and an "explicit administrative record" (Br. 26, 27, 37, 38). Therefore PPG concludes that "any other final action" must likewise be based on such a record. There are two main flaws in this argument.

(a) Although what PPG means by its label of a "contemporaneous" and "definite" record is unclear, the fact is that any agency action reviewable under the Act,

[3]The jurisdictional uncertainty avoided by our view is quite separate from the promptness it fosters in obtaining final decisions on judicial review. In this latter connection, PPG suggests, by citing a law review article (Br. 58), that initiating judicial review in district courts would not delay ultimate resolution of the merits and would not strain judicial and litigants' resources since appeals would be infrequent. The quoted portion of the article, however, refers only to the possibility of direct review in social security cases. Currie and Goodman, *Judicial Review of Agency Action: Quest for the Optimum Forum*, 75 Colum. L.Rev. 1, 25 (1975). We believe that the discovery in district courts contemplated by PPG (Br. 54) in the name of "verifying" the agency record would severely tax the resources of litigants and the district courts and that appeals would still be taken—on such voluminous records—to the courts of appeals.

[4]Our construction also avoids the incongruous result of construing "final action" in completely different ways under the Clear Air Act and the Administrative Procedure Act, 5 U.S.C. 704. PPG does not address this inconsistency.

however informal, must be based on an administrative record. Where judicial review of agency action is laid in the courts of appeals, 28 U.S.C. 2112(a) provides that the agency must file the administrative record with the court of appeals in "all proceedings instituted in the courts of appeals to * * * review or enforce orders of administrative agencies * * * and officers * * *." 28 U.S.C. 2112(b) provides that the record must include, among other things, the agency's order, the findings or report on which that order is based, and any pleadings, proceedings or evidence before the agency. If the court subsequently determines that non-included portions of the record are necessary for its review, the court may direct that the record be supplemented. 28 U.S.C. 2112(b). Rules 15 and 16 of the Federal Rules of Appellate Procedure, also authorized by 28 U.S.C. 2112, detail the manner of petitioning the court on direct review and the composition of the record for review of agency action. Thus, even the most informal agency action under the Act will be presented to the courts of appeals with a sufficient record. That procedure was followed here[5] and is ordinarily followed in all cases of judicial review of "informal" agency action.[6]

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[5]Contrary to PPG's argument (Br. 51 n.47), records of rulemaking under 5 U.S.C. 553 are not necessarily "formal." Rulemaking proceedings under 5 U.S.C. 553 must be based on a formal record only if required by other statutes to be made "on the record" after an agency hearing. Otherwise, Section 553(c) requires only that the affected party be given notice and an opportunity to submit written data or argument. *United States* v. *Florida East Coast Ry.* 410 U.S. 224, 238-240 (1973). The administrative record for review is compiled as directed by 28 U.S.C. 2112.

[6]Moreover, the quality of the administrative record should not determine whether review is more appropriate in the district courts or the courts of appeals. Ordinarily, even in the district courts when the administrative record is too skeletal for review, the district court may not permit discovery and trial de novo but must remand to the agency for a more complete record. The only exceptions are where the agency's fact-finding procedures are inadequate or and where the district court proceedings are enforcement proceedings. *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973).

(b) Contrary to PPG's premise, moreover, not all the specifically enumerated items in Section 307(b)(1) are required to be based on a "formal" record. Significantly, PPG admits (Br. 50) that the Administrator's orders under Section 112(c) are specifically made reviewable under Section 307(b)(1) in the regional courts of appeals, even though the Act does not require such action to be based on notice and a hearing or a formal record. It is obviously speculation by PPG (Br. 54) to dismiss this inconsistency in its argument with the curt suggestion that Congress must have wanted "special review," regardless of the form of the record, merely because the Section 112(c) agency action involves "hazardous pollutants." In addition, PPG incorrectly states (Br. 53) that any order under Section 111(j) must be preceded by notice and an opportunity for a hearing.[7] Only an order granting a waiver under Section 111(j) must be preceded by notice and a public hearing. 42 U.S.C. (Supp. I) 7411(j). An order *denying* a waiver may be made by the Administrator without formal proceedings. Such denials fall within the phrase "*any* order under Section 111(j)" made reviewable in the regional courts of appeals by Section 307(b)(1). Similarly, an order issued by the Administrator under Section 119(a), 42 U.S.C. (Supp. I)

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[7]Section 111(j)(1)(A) provides that the owner or operator of a new stationary source may request a waiver from the applicable standards for such sources in order to use innovative technology or continuous emission reduction systems. 42 U.S.C. (Supp. I) 7411(j)(1)(A)

7419(a), denying an application for a primary nonferrous smelter order, is not subject to notice-and-hearing requirements, but is explicitly reviewable by the terms of Section 307(b)(1) in the courts of appeals.[8]

3. PPG (Br. 40-43) creates an illusory conflict between our interpretation of Section 307(b)(1) and two other provisions of the Act. First, Section 206(b)(2)(B) provides that a manufacturer may challenge in the courts of appeals (i) the Administrator's prototype testing for new vehicles or engines and (ii) suspension or revocation of a certificate of conformity for new vehicles or engines. 42 U.S.C. (Supp. I) 7525(b)(2)(B). PPG argues (Br. 42) that our interpretation of "any other final action" repeals the review provision of Section 206(b)(2)(B). Not so. To begin with, PPG neglects to mention that whatever problem Section 206(b)(2)(B) poses to our construction is equally posed to PPG's theory. Section 206(b)(2)(B)(i) requires agency proceedings to be "on the record," a statutory feature that would trigger review under the "any other final action" clause even under PPG's view of Section 307(b)(1).[9] More importantly, Section 206(b)(2)

[8]Individual owners or operators of a primary nonferrous smelter are allowed under Section 119(a)(1), 42 U.S.C. (Supp. I) 7419(a)(1), to have the compliance date for emission limitations for sulfur oxides postponed under specified conditions. Section 307(d), specifying rulemaking procedures for certain actions of the Administrator, recognized the existence of Section 119 orders denying action and exempts such orders from any rulemaking procedures. 42 U.S.C. (Supp. I) 7607(d)(1)(G).

[9]Section 307(e) provides that nothing in the Act "shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section." This provision could hardly have been intended to nullify the judicial-review provision expressly authorized by Section 206(b)(2)(B). PPG argues (Br. 43 n.40) that Section 307(e) was only intended to prohibit review in citizen suits of issues that may be reviewed on preenforcement review. See PPG App. 5a. This appears to be correct, although there is little legislative history on the issue.

is fully consistent with our construction. Since Section 206(b)(2)(B) establishes a specific review mechanism for the agency action it describes, that provision is obviously controlling for that type of action over the more general "any other final action" language of Section 307(b)(1). *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 228-229 (1957); cf. *Preiser* v. *Rodriguez*, 411 U.S. 475 489-490 (1973).[10]

Second, PPG argues that our construction nullifies the parenthetical exception from review in Section 307(b). Not so again. The parenthetical material exempts from review any "standard required to be prescribed under Section 202(b)(1)." Our interpretation does not resubject such standards to review. Once again, the specific exclusive language of the parenthetical concerning a specific type of agency action controls over the general inclusive language of "any other final action."[11]

[10]Both Section 206(b)(2)(B) and Section 307(b)(1) provide for review in the courts of appeals under similar procedures. The only difference is in the venue allocations. Section 206(b)(2)(B) lays venue in the circuit wherein the manufacturer has its principal place of business or resides.

[11]The "standards" referred to in the parenthetical are not subject to any preenforcement review. This is understandable inasmuch as those standards are statutorily set by Section 202(b)(1) and are not set by EPA. Section 202(b)(1)(A) requires that certain regulations "shall contain standards which provide that [certain] emissions * * * may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per [redacted] vehicle mile of carbon monoxide." Section 202(b)(1)(B) requires that the regulations for certain nitrogen oxide emissions require "standards which provide that [certain] emissions * * * may not exceed 2.0 grams per vehicle mile." There is no point in authorizing judicial review of standards not set by EPA but by Congress.

4. PPG tries to make much (Br. 32-33) of the fact that the House Committee did not expressly endorse or reject Recommendation E of the Administrative Conference. That recommendation dealt with subject-matter jurisdiction under the Clean Air Act only by suggesting that the parenthetical omission for new-car standards be dropped and that such standards be added to the list of specifically enumerated items. Since Congress did not eliminate this exception, it is understandable that Recommendation E dealing with "Actions Subject to Court-of-Appeals Review" was not expressly approved. Had the Administrative Conference recommended that an "any other final action" clause be inserted, the House Report no doubt would have addressed it. No such recommendation was made, and it is unilluminating to try to divine some meaning from the failure of the House Report to address a recommendation that really does not fit the action later taken by Congress.[12] Perhaps the most compelling response to PPG's argument that only venue changes were intended is that even PPG admits that the "other final action" clauses expanded the subject-matter jurisdiction of the courts of appeals. How far it was expanded is the basic question, and the Administrative Conference recommendations and the references to them by the House Committee do not really supply a direct answer.

[12]Similarly, had Congress really intended to adopt only the "venue" recommendation of the Administrative Conference, it would simply have provided that action "approving or promulgating state implementation plans is reviewable in the circuit containing the state whose plan is challenged," the only recommended change in venue suggested by the Conference (see PPG App. 8a). That Congress did not limit itself to this narrow change shows that it went well beyond the narrow venue recommendation of the Conference.

In this connection, PPG states (Br. 36-37) that the Administrative Conference "pointed to one common characteristic, shared by each section enumerated in Section 307(b)(1) (pre-1977 Amendments)" and that "[t]hat common element was that each of the specified actions of the Administrator had to be taken in compliance with the Administrative Procedure Act and then would have been taken upon a complete and contemporaneously compiled administrative record." Evidently, PPG's point is that Congress meant to carry this scheme forward in the 1977 Amendments. No such statement, however, appears in the report of the Administrative Conference (see PPG Appendix).[13] Curiously, moreover, in the next breath (Br. 37 n.36) PPG admits the statement it attributes to the Conference is erroneous.

5. PPG's due process challenge (Br. 59-60) is without merit. First, PPG has had a "reasonable opportunity to be heard and present evidence" under EPA's determination procedure (40 C.F.R. 60.5). *Yakus* v. *United States*, 321 U.S. 414, 433 (1944). Second, all persons affected by EPA final actions under the Act have ample time to file review petitions. Indeed, the period for filing them does not even begin to run until EPA publishes notice in the Federal Register of its action. Third, even where the Act does not require formal proceedings, the agency may not

[13]PPG contends that the technical amendments would not have been necessary under our construction. The same, however, is equally true of PPG's construction inasmuch as PPG contends all (but one) of the specifically enumerated items in the technical amendments were already covered by the "final action" clauses. As we pointed out at pages 22-23 (note 17) of our opening brief, however, it is not fatal to our (or PPG's) argument that Congress indulged in some redundancy to make sure certain actions were reviewed in one circuit rather than another.

arbitrarily and unreasonably refuse to consider any information a party may wish to offer in support of its position, and any such refusal may render the agency's final decision arbitrary and capricious. 5 U.S.C. 706(2). It is therefore highly unlikely that any final agency action may ever be taken and affirmed on preenforcement review under the Act in violation of due process. Finally, if any such denial of fair procedure ever does occur, there will be time enough to determine the constitutionality of the preclusion clause at that time. In such a case, the remedy would be invalidation of the preclusion clause as applied, not a modification of the scope of Section 307(b)(1).[14]

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[14]The special statutory problem involved in *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F. 2d 904, 913 (D.C. Cir. 1979), justified that court's reference to the potential due process question. Although the Noise Control Act, 42 U.S.C. 4915(a), has a preclusive review provision like that in the Clean Air Act, only specific enumerated sections in the Noise Act are subject to preenforcement review. 42 U.S.C. (Supp I) 4915(a). The problem in *Chrysler* was that the Administrator decided that certain regulations were in fact within the ambit of the review provisions of the Noise Act only after the period for review had expired. To avoid the constitutional issue, the ambiguous list of enumerated actions was construed not to include the regulations. This problem cannot arise under the Clean Air Act because of the addition of the "any other final action" clause and the protection of Federal Register publication.

None of the decisions (PPG Br. 44-45) construing the pre-enforcement-review provisions of other environmental statutes are relevant because none of them contain the critical "any other final action" clause. The pre-amended version of the Clean Air Act, the Federal Water Pollution Control Act, 33 U.S.C. 1369(b)(1), and the Noise Act, 42 U.S.C. 4915(a), authorize original preenforcement review in the courts of appeals only for specifically enumerated actions. See *Utah Power & Light* v. *Environmental Protection Agency*, 553 F. 2d 215, 218-219 (D.C. Cir. 1977) (pre-amended Clean Air Act); *Crown Simpson Pulp Co.* v. *Costle*, 599 F. 2d 897, 900 (9th Cir. 1979) (Federal Water Pollution Control Act Amendments of 1972); *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F. 2d 904, 907 (D.C. Cir. 1979)) (Noise Control Act). In addition, no court of appeals other than the Fifth Circuit has declined jurisdiction under Section 307(b)(1) of the Clean Air Act on the theory advanced below.

For these reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded for consideration of the merits.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1980